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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1900.

No. 209.

ALLEJANDRO BARKER, et ali.,
Plaintiffs in Error,
vs.
J. DOWNEY HARVEY, Admr.,
et al.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

Plaintiffs in error ask this Court to review a judgment for the defendants in error (original plaintiffs) in the Supreme Court of the State of California, rendered by that Court October 4th, 1899, and reported in 126 California Reports,

page 262, under the title of *Harvey* v. *Barker*. The case was heard and decided by the Court in bank, the opinion being by Mr. Justice Van Dyke, and a rehearing was denied. The action was originally brought by ex-Governor John G. Downey and the Merchants' Exchange Bank of San Francisco, and is a statutory proceeding known as an action to quiet title, brought under Section 738 of the Code of Civil Procedure of California, against the plaintiffs in error, who are alleged to claim some estate or interest in the real property which is the subject of the action, adverse to the defendants in error to determine such adverse claim. The premises are known popularly as Warner's Ranch, comprising the Valle de San Jose, a valley of nearly 50,000 acres, bounded on three sides by the Palomar, the Agua Caliente, and the Volcan mountains at the headwaters of the San Luis Rey River. The defendants in error claim title to the property by virtue of two patents. One for the northern half of the valley, issued to J. J. Warner January 16, 1880, pursuant to the provisions of the Act of Congress of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," based upon a grant to Warner of the San Jose del Valle made by Governor Michaeltoreno November 28th, 1844. The *deseno* or sketch accompanying the petition includes the entire

San Jose Valley. The south half of the valley that defendants in error claim title to under a like patent issued to Warner on the 10th day of January, 1880, founded upon a grant made the 16th day of April, 1836, to Silvestre de la Portilla, of the Valle de San Jose, being the premises involved in the case of *Quevas* v. *Harvey*, No. 210 in this court. The two patents cover the entire valley, and the whole is commonly known as Warner's Ranch. The two cases involve the same questions and were submitted together in the Supreme Court of California, and we shall file the main brief in this case, pointing out in the Quevas case any differences.

The plaintiffs in error claim some possessory right as Mission Indians, and separate in their answer into three groups. One assert such right in a tract consisting of 1907 acres, the second in 266.43 acres, and the third in 120 acres. They base their right of possession to these tracts of land under a claim that their ancestors were Mission Indians, and that they and their ancestors have been in continued occupation of the premises from a time anterior to the grant. No evidence of any specific grant or authority from the Mexican government for such occupation is shown. The theory is that their rights arise from the alleged facts that their ancestors were Mission Indians and were in occupation of the premises at the time the grant

was made and confirmed. They claim that the patent is subject to their rights of occupation, for two further reasons—one, because at the time Warner presented the grant he also presented another grant made by Governor Alvarado to Jose Antonio Pico on the 8th day of June, 1840, of certain premises which were included within the subsequent grant to himself, which grant contained the conditions that the grantee should not molest (*prejudicar*) the Indians that thereon may be established, and that it was subject to the approbation of the Departmental Assembly. This grant, however, was rejected by the Commissioners because it had not been so approved by the Departmental Assembly, and the Commission held that the later grant to Warner included the entire premises, and ordered that the grant to him be confirmed and the Pico grant be rejected, and the patent was issued accordingly without any reservation concerning the Indians. The second ground of claim is that their rights are referred to and preserved in the words "without interference with the roads and other usages" (*servidumbres*), a clause which so far as our investigation goes was inserted in all grants.

A survey of the grant with the plat thereof and the descriptive notes authenticated by the signature of the Surveyor General were duly deposited in 1879 in the General Land Office in

accordance with the act of March 3rd, 1851, and acts supplementary thereto, which acts, so far as they are important, we give in an appendix to our brief. All objections having been disposed of, the Commissioners caused the patent, to which we have referred, to be issued, and the field notes and plat were annexed thereto. "The description and map includes the northern half of the valley of San Jose, including the premises here in controversy; the southern half of the valley having been patented to Silvestre Portillo in an earlier grant from the Mexican government in 1836." (Tr., fol. 37.) No claim is made that any reference to or indication of the existence of Indian settlements is shown by said field notes and plat. The patent shows that the Agua Caliente (Tr., fol. 34) or Hot Springs were included in the grant and plat, and the *expediente* as well as the *deseno* shows that the entire valley was described.

At the trial in the Superior Court of San Diego County the plaintiff put in evidence the patent, and it being stipulated that all the right, title, and interest of the patentee had passed to the plaintiffs, and that they had paid all taxes levied or assessed upon the premises in controversy since 1880, they rested. (Tr., fol. 38.)

Defendants then offered in evidence the complete original *expedientes* of both the Warner and the Pico grants; the proceedings before the

Land Commission, including the depositions of witnesses, and also the oral testimony and depositions of a number of witnesses, including Warner and some of the defendants in this suit, to show that the defendants (plaintiffs in error) and their ancestors had lived upon the premises in question from a time anterior to the making of the grant. The trial Court, holding that the patent was conclusive against the defendants, excluded this evidence upon the final decision of the case. The evidence is in the transcript, and we shall consider the case as if it were before the Court. From the judgment and from a motion denying a new trial an appeal was taken to the Supreme Court, which affirmed the judgment in Justice Van Dyke's opinion given in the record.

To recapitulate: Warner's Ranch consists of the entire San Jose Valley, including the premises in question; held under two patents. The southern half under a grant to Portilla, made the 16th day of April, 1836, patented to Warner, which included only that portion of the valley. The northern half, first granted in 1848 to Pico under the name of Agua Caliente; the grant not confirmed, and Pico abandoned it, and confirmation was made and a patent issued to Warner for that half, under a grant made to Warner in 1844, describing the entire valley.

POINTS AND AUTHORITIES.

The ultimate contention of the plaintiffs in error is that they or their ancestors were Mexicans who had property rights which are protected by the treaty of Guadalupe Hidalgo, and as such Mexicans that they are third persons, whose rights are preserved by the fifteenth section of the Act of March 3rd, 1851, and by the patent issued to Warner.

The plaintiffs in error to maintain this contention must establish three propositions:

1. That they or their ancestors had rights in this land, either granted by the Mexican government or acquired under it, which rights have been transmitted to the plaintiffs in error.

2. That they or their ancestors were Mexicans whose rights were preserved under the treaty.

3. If they or their ancestors ever had such rights that they or their ancestors were included within the class of third parties, whose rights were preserved by the Act of March 3rd, 1851, and the patent issued thereunder.

I.

NO RIGHTS WERE GRANTED TO OR ACQUIRED BY PLAINTIFFS IN ERROR OR THEIR ANCESTORS UNDER MEXICAN LAW.

California was conquered by means of Missions. The missionaries found the country pop-

ulated by Indians living in loose tribal relations, with but little attempt at any government, no agriculture, no pastoral property, living principally upon grass seeds, roots, grasshoppers, and mast; not exactly nomadic, but moving their villages here and there in search of food.

The Indians in question (Digger Indians) are a mixture of the Yuma and Shoshone races. They have no true tribal relations; they are merely a mixed race. (*Jaeger* v. *United States*, 29 Court of Claims, 172.)

Those of the plaintiffs in error who live at Agua Caliente speak the Cahuillas dialect, and are evidently of that race which made so many hostile attacks upon the Missions and the Mission property. The estimate in which the whole Indian race was held cannot be better shown than by the term applied to all other people of California, black as well as white, "gente de razon"—people of intelligence, which was used to distinguish and exclude the Indians from the human race. (Hittell's History of California, Vol. 2, p. 476.)

The missionaries established their Missions from the South to the North, a convenient day's journey apart, and called the Indians into their fold. The secular government followed the Missions and established praesidios in their aid. The Indians living outside of the Missions were

regarded as without the pale of the law. At the requisition of the missionary authorities the military would proceed in arms, break up outside Indian settlements, and drive the Indians at the point of the sword to the Missions. Here the Indians were assigned locations to establish their huts. No lands were assigned to the Indians for individual cultivation, nor cattle given them. They labored under the direction of the Mission to raise crops, which were garnered into the Mission granaries; they were detailed as herders of the common herds and liberal rations served out.

Thus, at the time of the secularization of the Missions in 1833, the majority of the Indians south of San Francisco had been gathered into the fold of the Missions, and those outside were regarded as hostiles.

The Mexican Laws Applicable to California.

The first regulation in regard to the Mission lands is to be found in the Viceroy's instructions to the commandant of the new establishments of San Diego and Monterey, August 17th, 1773, which is to be found annexed to Gen. Halleck's report in Rockwell's Spanish and Mexican law, page 444.

Article 12 directs "also even to distribute lands to such Indians as may dedicate themselves

to agriculture and the breeding of cattle, for having property of their own the love of it will cause them to radicate themselves more firmly."

Article 13 authorizes the granting of titles to individuals, whether Indians or new settlers. Provision is made, if desirable, to change the missions into pueblos. Here in the very organization of the Missions it was evident that the pueblo system was in the minds of the authorities. The other predominant feature is to encourage agriculture and agricultural pursuits on the part of the Indians, and for that purpose to grant them title to lands. Not a mere right to occupy lands which they were holding, but to treat them as the new settlers were treated. These decrees were never carried out by the Missions, nor became effective in California.

The colonization law of 18th of August, 1824 (see Appendix), with the rules and regulations therefor, are the basis of substantially all Mexican grants, the former does not mention the Indians or the Missions; but the rules and regulations of Nov. 21st, 1828 (see Appendix), provide, (Art. 17):

"In those territories where there are Missions the lands occupied by them cannot be colonized at present, nor until it be determined whether they are to be considered as the property of the establishments of the neophytes, catechumens, and Mexican colonists."

This was followed by the law of August 17th, 1833, for the secularization of the Missions of California, which made no provision for the cultivation of lands, but decreed that the Mission lands were vacant National property.

Gov. Figueroa's provisional rules of the 9th of August, 1834, for the secularization (Rockwell, p. 456), in some articles refer to the Indians. Thus article 16 compels the emancipated Indians to assist in the common labor. By article 17 they are to render to the missionary priests personal services; and by Article 23, subdivision 4, lots are to be divided to the Indians to cultivate. These lots are shown by Article 5 not to be land of the description of the property in suit, but lots in the neighborhood of the Mission, 400 varas square, to be assigned to each head of a family. By subdivision 9 it was directed that where the Indians were left in rancherias, at a distance, they should be formed into a pueblo and a like distribution made. It will be observed that there is no provision made either for the distribution of lands similar in character to the lands in suit, or for the reservation of any rights of occupancy on the part of the Indians who might be living thereon unless organized into pueblos. The evident intent was to reduce the Indians as nearly as possible to a civilized condition and to allot separate parcels of ground about some central community or pueblo to the Indians.

No trace of the rights claimed by the plaintiffs in error here, but of a diametrically opposite character.

The regulations of Gov. Alvarado of March 1st, 1840 (Rockwell, p. 466), also directs by Article 6 that the Indians shall assist in labor and shall be chastised for their faults. By Article 24 they cannot be let out to service without a positive superior order.

In Gov. Michaeltoreno's proclamation of the 29th of March, 1843, which restored the missions and the lands immediately contiguous to the missionaries, it is directed "that the dispersed Indians shall be gathered, both those who were legally emancipated and those in the service of private persons, who may return to the Missions with the knowledge of their masters and of the reverend missionary." In article 5 it is provided that no new grants will be made "without the information of the Reverend Padres, notorious unoccupancy, want of cultivation, or necessity." By the decree of the Departmental Assembly, May 28th, 1845 (Rockwell, p. 471), the government must designate the Indian lands, and Pico's regulation (Rockwell, p. 472) of October 28th, 1845, shows that the provisions in regard to Indians relate to the portions of the lands occupied by them about the Mission, where they have their gardens and a home; and even as to these it is directed as by the earlier decrees,

which we have recited, that the ownership thereof is to be adjudicated to them. In other words, they are to have title by grant; something which they could exhibit to show their claim of ownership. The same Article (Article 20) goes on to declare: "It being understood that they cannot alienate said lands, but they shall be hereditary among their relatives according to the order established by the laws." This expression in the regulations of Pico seems to be the basis for the declaration in Halleck's Report and in subsequent decisions that the Indians' title was not capable of alienation. Such was not the general law either of Spain or of Mexico, although there were strong safegrounds thrown around the manner of alienation.

The missionary scheme planned by the Court of Spain, included the reduction of the country to the domain of the Crown and the Church, the civilization of the native inhabitants and their formation into semi-self-governed communities, to whom homes could be allotted in severalty out of the lands of the community. The title of the property, within missionary jurisdiction, real and personal, still remained in the Crown, although, as one writer says, facetiously, "the property belonged to the Indians and, as the Indians belonged to the padres, it belonged to the padres," but neither had any legal right of ownership even in the land upon which the missions stood. They

held it for the purpose of christianizing and civilizing, and according to the original scheme, secularization would eventually come. That meant an organization of the neophytes into pueblos and the allotment of lands, the appointment of priests, under the jurisdiction of the Bishop, and the termination of the missionary system. Nowhere was it contemplated that the aboriginal rancherias should be maintained. The whole plan was destructive of the aboriginal system, which was to be destroyed, in order to build upon it the system conceived by the Court of Spain.

This plan, so far as the Indian pueblos were concerned, was a dismal failure in California. Croix's scheme on the Colorado river was a complete wreck (Bancroft, Vol. 18, p. 457). The experiments tried under the secularization law of 1833, on the coast side, were not more successful. Only one mission was organized into a pueblo, that of San Juan Capistrano, and this pueblo disappeared. A little further down the coast, under the jurisdiction of San Luis Rey, an attempt was made to form a pueblo at Las Flores, which failed, and the members of the community surrendered their title to Pio Pico, and the transaction was affirmed by this Court (*U. S.* v. *Pico*, 5 Wallace, 536) as a part of the Santa Margarita y Las Flores grant. The Indians at San Luis Rey were unanimously opposed to forming a pueblo

(Bancroft, Vol. 20, p. 332). The records of the Missions show that after, as well as before secularization, the neophytes were driven back by force to their huts about the Mission itself. Another attempt from San Luis Rey to found a pueblo at a distance from the Mission, was at San Pasqual. The history of this pueblo, in whose village Kearney fought the battle of San Pasqual, is well told by Professor Blackmer in his "Spanish Institutions in the Southwest" (p. 146). There he illustrates the whole subject, showing that the Indians never had any possessory rights in the land which were recognized either by the Spanish, Mexican or American governments; and this was the case of San Pasqual, where the United States government deprived the Indians of the most thoroughly organized Indian pueblo which ever existed in the state of California, of their rights of occupation. The story is also told by Mrs. Helen-Hunt Jackson in "Ramona," for she locates the home of Allejandro and Ramona in this pueblo. The only remaining attempt was at San Dieguito, still further south, near the San Diego Mission, and here, too, against the protest of the Indians, the land was granted, first to Silva and then to Osuna, by the Mexican government, and the latter's rights sustained by the United States authorities as against Indian occupation.

Agua Caliente and San Jose were never organ-

ized as pueblos, and were never recognized as Mission ranchos (Brancroft, Vol. 20, p. 624), although they may have been occasionally occupied for Mission purposes, and even those ranchos mentioned by Bancroft have passed into private ownership and the Indians excluded from their occupation. Had the Indians at Agua Caliente been Mission Indians they would have been gathered either at the Mission, or at Santa Ysabel or Pala. The fact that they were not, shows that they were not treated as dispersed Indians, or hostiles.

After the secularization some of the Indians remained at the Missions, others scattered as laborers in the pueblos and ranchos; the majority lapsed into barbarism, and went into rancherias in the mountains. Of those who remained at the Missions, some cultivated lands for themselves, which may have been in some instances alloted under the regulations.

Those "*emancipated Indians*" who left the Missions and settled elsewhere, *acted in defiance of the regulations, and could found no rights on their acts so committed.*

Wherever lands were petitioned for in the neighborhood of Missions, the Mission authorities were cited to show cause why the grant should not be made (see Gov. Micheltoreno's proclamation), and they were again cited as

colindantes, when judicial possession was given.

When a grant was made without special reservations in favor of the Indians, it must be presumed that there were no valid Indian claims.

The law cited by counsel and Court in *Byrne* v. *Alas*, 74 Cal., 633, had reference to Indian proprietorship *where there were India Pueblos*, and not to such a state of affairs as existed in California, where they could only apply to Mission lands; to that extent the opinion in that case is, perhaps, founded properly upon them, but as to other lands it is otherwise.

The law of 1828 provided for the granting of vacant lands, and for the method of ascertaining whether the lands petitioned for were vacant.

Numberless expedients show how the inquiry was made through the respective Ayuntamientos, and how, thereafter, the *colindantes* were summoned to the judicial possession.

No Indian Pueblos existed in California; no recognized Indian settlements but those authorized by the Missions, so that when a grant of non-Mission lands was made, having any Indian settlements thereon, the grant must be held to be and was authorized by the Missions, and that it was the intention to remove the Indians to the Missions.

In the case at bar the Warner Ranch Indians were mere outside barbarians—incapable of ownership and incapacitated for civilization.

Warner's grant shows that the land was vacant, the assent of both the San Luis Rey and San Diego Missions was obtained, and the approval of the Departmental Assembly (Tr., fol. 44-45) shows that all the proceedings had been duly had "in conformity with the law of the 18th of August, 1824, and the Article 8 of the regulation of the 21st of November, 1828."

It must also be remembered that it was the practice of the Missions to farm out Indians to Vicinos of the pueblos and rancheros, and that there would always be a number of such Indians on every rancho.

"There will be found in the works cited no account of the quasi-Christianized Indians of the Missions. Their aboriginal customs have so faded out, their tribal organizations and languages have become so hopelessly intermingled and confused that they can no longer be classified." Stephen Powers' Contributions to North Am. Ethnology, Vol. III., p. 116.

That this should be the case in such a short time (less than a century) shows that the Indians of Southern California had no cohesion, no real tribal or governmental organization. Note how persistent have been the *Indian Pueblos* wherever they have existed. How they are today extant in New Mexico carrying out their own laws and peculiar policy.

Bancroft shows how the outside rancherias were treated as hostile *gentiles* without the pale of the law.

Nor can there be any doubt of the power to make the grant to Warner without any reservation of rights to Mission Indians. Discussing the decrees which we have cited, this Court say:

"Under these laws, the authorities empowered to grant the public lands have dealt with these Mission establishments the same as with any other portion of the public domain; the clergy, who previously had the charge and control of them, being confined simply to the ecclesiastical and spiritual direction and government of the Missions." (*United States* v. *Ritchie*, 17 How., 525.) In a later case the Court affirmed the case of Ritchie, and further decided that the right of the missionaries and the Indians to the occupation of the land was at the will of the sovereign and terminated with the grant. In that case the Mission had apparently assented to the grant as to Warner's grant.

"The large tracts of land appurtenant to the Mission establishments were never vested in the Church, or any other corporation or individual by any grant of a legal title. The missionaries and Indians had an usufruct or occupancy of the land at the will of the sovereign. The record shows that, though the lands now in

question had formerly been occupied by the Mission, they were not so at the time this grant was made. It was made, also, with the assent of the Mission, who set up no claim to further occupancy.

The 17th section of the Regulations of 1828 forbid lands occupied by Missions from being made the subject of colonization grants for the present, &c., and can therefore have no application to lands not so occupied and not made the the subject of colonization. Besides, in 1833 and 1834, the government of Mexico passed laws to secularize the Missions; since which time the public authorities have granted these lands to individuals in the same manner as other public lands, as has been decided by this Court in the case of *United States* v. *Ritchie*, 17 How., 525."

United States v. *Cervantes*, 18 How., 553.

And this power and practice have been recently reaffirmed by this Court.

"This was in accordance with the general rule that the missionaries and the Indians only acquired a usufruct or *occupancy at the will of the sovereign*."

Faxon v. *United States*, 171 U. S., 244, 259.

The assent of the Mission was in effect obtained by the notice required of the proceeding in which they had the right of protesting before the supreme government that in a particular

grant the neophytes' prospective needs had been ignored. (Bancroft, Vol. 23, p. 562).

The Spanish Law.

Having given all the Mexican laws and regulations applicable to this grant, and called attention to every reference to the Indians, let us now review the decrees made by Spain previous to the Declaration of Independence, and in doing so we will give every reference to the rights of Indians which we have been able to find.

The first is in the Cedula of November 1st, 1591, the first royal disposition of lands in Mexico. It ordered distribution to Indians as well as Spaniards. "To the Indians what may be necessary for them to sow, cultivate and to raise stock." Provision is made for the compromise and grant to the possessors (amongst other lands) of Indian farms (*chacaras*) and for a new confirmation to their possessors. Indians, to whom distribution is made, are those who have fields which they sow and cultivate and upon which they raise stock.

The general laws in regard to the disposition of Crown lands collated in the Recopilicion de la Indias, and published by royal decree, May 18, 1680, Book 4, Title 12, provide for the distribution of Indians to the holders of grants, "in order that they may enjoy their profits and

labors in conformity with the taxes and what is ordered."

Law V, which evidently deals with the apportionment by pueblos, decrees, "that to the Indians should be left their lands, cultivated lands and pastures, in such a manner that they may not lack what is necessary, and that they have all the comfort and repose possible for the sustenance of their houses and families."

Laws VII and IX. The apportionment shall be without distinction of persons or prejudice to the Indians.

Law XIV, provides for the confirmation of lands to the Indians of what may be necessary for them to cultivate and to sow, and to raise cattle, and for appointment of a competent term in which should be exhibited the titles of lands, including Indian farms.

Law XVI, allows the Indians to present their claims; citation and examination of witnesses is provided for "and the titles which shall be given to the interested parties must bear our confirmation, with the original terms which is observed in the grants of assignments of Indians."

Laws XVII and XX. The *fiscales-protectores* are directed to prosecute the rights of the Indians where Spaniards have acquired rights by contract with them contrary to the orders of the cedulas and ordinances. Unconfirmed grants are to be revoked and the lands returned to the Indians.

Laws XVIII and XIX. Lands which are to be left to the Indians, "as well to the individual Indian as to the communities", and waters and places of irrigation, and the lands in which they have made ditches for irrigation, or any other benefit with which, by their personal industry they have fertilized, shall be reserved in the first place, and in no place can they be sold or alienated; and communities of Indians are admitted in preference to individuals. And provision is made for the judges specifying the Indians in possession of the land and the lands which are set aside.

The exact time when these decrees were made is not certain. The references give dates from Ferdinand V., June 1513, to Philip IV., June 30th, 1646. In any event, they exhibit the law prior to the year 1680 and show that even at that date the rights of the Indians were to be authoritatively defined and granted to them by recorded grants, and when so marked out and granted, their rights were to be carefully preserved and that whatever rights the Indians had in the lands were rights of the same character and of equal dignity with those of Spaniards, to whom grants were made. Moreover, they show that it was the Indians of the pueblos and individual Indians, of like character, who were, at least, in a semi-civilized condition, to whom grants were made and whose rights were protected. They were

those who tilled their fields, who raised cattle and who had artificially irrigated lands. The Cedula of June 4th, 1687, which somewhat modifies the provisions of the laws cited, shows that the object of the provisions which we have given was to create and care for Indian pueblos. This Cedula and others which follow it show the contest which had already arisen between the ranchers and the Indians, and that the royal intention was to protect the Indians so long as they lived in the pueblos organized and duly assigned to them under the royal decrees. Their rights were fully protected, for in all grants of land notices were posted in the Indian tongue and read in their presence, and testimony was taken to determine whether an Indian pueblo had any right to the land. In the Cedula of October 15th, 1754, which dispensed with the necessity of confirmation of grants by the king, confirmed titles previous to 1700 and provided for the presentation of titles for confirmation, the only reference to Indians is in Section 2, which provides for the maintaining of the *Indians of the pueblos* in the possession of their lands and the extent of those lands are according to the exigencies of the population. The same section provides for a like leniency toward the Spaniards and the other casts as to the lands which they possess. A most important decree under the Spanish regime, is that of the 4th of

January, 1813, the pertinent parts of which we print in the appendix. This decree, although suspended for a time, continued in force during the Spanish dominion and provides for the reduction of all common lands to private dominion; that the titles shall be in fee, with the right of enclosure, "without prejudice to the sheep-walks, cross-ways, watering places, and services, and to enjoy them freely and exclusively", a declaration of the utmost importance, since it declares, first, that all vacant land is subject to grant and that the title, when granted, is to be in exclusive ownership, with the right to exclude all others, subject to the rights of way and water. We also print in the appendix the decree of the 13th of September, 1813, which shows that the chief purpose of this decree was to deal with provinces of regular Indian pueblos. It had no application to California, where it would have at once secularized the Missions had it been a province of *Indian pueblos;* but the Missions of California were not missionized Indian pueblos. This is the concensus of all the authorities. The Indian settlements had been created by the Missions, and, furthermore, there were, as yet, no secular clergy in California.

We repeat, that it is notorious that prior to 1833 there was no cultivation of the land by the Indians in California, save at the Missions.

After 1833 the only cultivation was at the Mis-

sions, and by Indians who had left the Missions.

In 1833 the Mission Indians were called *emancipated*, but had no permission to leave the Missions and take up outside lands; if they did so, it was contrary to law.

The Peculiarity of the Warner Ranch Indians.

If the Missions ever exercised any control over those with whom we are now contesting it is not apparent. The testimony introduced for the purpose of showing the peculiarities and characteristics of the defendants does not support this appeal. The evidence of two Indians of unpronounceable names is to the effect that in ancient days crops were taken to the San Luis Rey Mission (Tr., fol. 83). A venerable Warner Ranch female named Sivimoat informs us that she remembered when the padres of the San Luis Rey Mission had charge of the Indians at Agua Caliente (Tr., fol. 83.) Warner testifies that when the priestly authority ceased the Indians dispersed. (Tr., fol. 77.) They worked about the country, gathered acorns, stole sheep, and lived otherwise in accordance with the practices of the day. (Tr., fol. 77.) These wandering and worthless beings are supposed to possess paramount proprietary interests in land already granted by the United States and in no way protected by treaty stipulation or statutory en-

actment. Colonel Warner found it necessary to kill a few of these savages. (Tr., fol. 80.) If the Mission Fathers had anything to do with the Agua Caliente establishment the connection ceased very early. (Tr., fol. 74.) Military forces were necessary to subdue them. (Tr., fol., 65.) Mr. Swycaffer says that he and his military associates killed some Indians. (Tr., fol. 65.) He affirms that the right men were shot, adding: "It's always the right ones." Swycaffer undoubtedly felt that no mistake could be made with reference to an incident of this kind where the Agua Caliente Indians were concerned. The natives eat seeds, acorns, etc. (Tr., fol. 66.) They occasionally eat rats.

Gen. Emery in his Notes on a Military Reconnoisance, Senate Executive Document 7, Thirtieth Congress, first session, page 105, gives a graphic account of the situation of the rancheria in December, 1846. It was in charge of Marshall, then the foreman of Warner. He describes it with the thatched huts of the half-naked Indians, "who are held in a sort of serfdom by the master of the rancheria", surrounding Warner's house.

The defendants do not belong to civilization. They must be attended to, it is true, and protected, but they cannot interfere with the effect of a patent of the United States. The

United States cannot saddle upon the patentees of a Mexican grant an obligation not written in the instrument which the government has issued in confirmation of a claim made.

The obligation to protect the Indians is purely a moral one and devolves upon the government. It has nothing to do with the effect or strength of a Spanish or Mexican grant. The Indians are being well treated; but if it were otherwise the controversy would not be affected, for, whatever may be the moral obligations of the United States, and it is to be assumed that the same will be adequately discharged, it is obvious that no such public burden can be lawfully placed upon the shoulders of the individual citizen.

THE MICHAELTORENA GRANT TO WARNER, BASED ON THE FINDING OF THE PREFECT THAT THE LANDS WERE VACANT AND ABANDONED, IS AN ADJUDICATION THAT THE INDIANS HAD NO RIGHTS IN THE PREMISES GRANTED.

Conceding that a grant containing the clause found in the grant to Pico to the effect that "the grantee shall not molest (*prejudicar*) the Indians that thereon may be established," would preserve the rights claimed for the plaintiffs in error in the premises, the fact that Warner's grant contained no such reservation is a binding adjudication that no such rights existed. It was

an act of the political department of the government, but judicial in its character, for the determination of the fact which is here in controversy. The record in this case shows that the grant to Pico made in 1840 contained that clause. The reasons are evident upon the face of the expediente. Pico says in his petition that he wished to settle alongside of the Indians,with whom he seems to have some agreement. And the evidence of Don Juan Foster is that Pico employed the Indians in setting out his vineyard on the premises in controversy. (Tr., fol. 55.) On the other hand, the expediente of the Warner grant shows that the premises had been "abandoned on the ground of the many robberies on the part of the wild Indians" (Tr., fol. 41); and was in due course forwarded to the head of the San Diego Mission, Father Olivas, who reports that it belongs to the Mission of San Diego, which has no means to cultivate and occupy the land, and it is not necessary to the Mission. The Juez de paz at San Diego, authorized to act as Prefect under the order of Nov. 14, 1843, thereupon the next day found and certified that "the said Valle San Jose is and has for the last two years been vacant and abandoned * * * but said place belongs at the present time to said Mission." (Tr., fol. 41.) Moreover, it can not be said that the rights or interests of the San Luis Rey Mission were overlooked. They

were scrupulously provided for (Tr., fols. 40, 44, 45.) Warner, whose attitude towards the Indians all through is hostile, testifies that he arranged satisfactorily with the Mission. (Tr., fol. 80.)

The labored argument made that Warner only petitioned for the south half of the valley and not for the north half, which was confirmed to him, fails in view of the repeated declarations cited showing that the San Luis Rey Mission property, which was situated in the Indian village (Tr., fols. 56, 69) was to pass to the possession of Warner.

As was said by Mr. Justice Baldwin upon a question as to the validity of a grant of Indian lands in Florida:

"This seems to be a mode of proceeding known to the Spanish law in force in the province, in the nature of an inquest of office, as a judicial act * * * whether from the nature of the Indian right of occupancy it had in law and by the actual condition of the land, in fact, reverted to and become reannexed to the royal domain by the abandonment of the occupancy * * * This is a matter which we feel bound to consider a judicial one and that we cannot look behind the final sentence of the authorized tribunal to examine into the evidence on which it was founded, but must take it as a *res adjudicata* by a foreign tribunal judicially known and to be respected as such. Similar proceedings are directed by the various acts of Congress, the Land Commissioners, the officers of the Land Office, as the case may be, confirming the claims to the

lands embraced in the rejected claims reverts to the public fund. So it is provided by the 7th section of the Act of 1824, as to claims barred by not being duly presented or prosecuted, or which shall be decreed against finally by this Court."

United States v. *Arredondo*, 6 Pet., 691.

This Court has no jurisdiction to revise the acts of a political department of the Mexican government done by authorized officials in the course of a regular proceeding; the action of the Mexican authorities settled this question forever, as has been declared again and again by this Court in decisions which we will hereafter cite. The only questions which can be raised by a person denying the validity of the act are power in the officer or fraud in the party. There is no pretense of lack of power in the Mexican officials, and there are no allegations or evidence in the proof of fraud in the party. The action of the Mexican government, therefore, is a conclusive adjudication that the lands were vacant and that Warner was entitled to the exclusive occupation of the grant.

Plaintiffs in error claim that their rights are preserved by the reservation in the Pico grant. Our answer to this is that the land for which Warner petitioned covered that included in the so-called Pico grant; that the Land Commissioners decided that the Pico grant was void, and that the Warner grant, which described the

whole valley of San Jose was confirmed. In this case the same testimony was before the Court upon the rights of the Indians. (Tr., fols. 55-58.) This decision was affirmed by the District Court on appeal, and in a controversy between Pico and Warner the Supreme Court of California held that Warner obtained nothing in the Pico grant.

"Whether the grant to Warner was properly located or not on land previously covered by the grant to Pico is a matter which does not concern the plaintiff. When that grant was confirmed it became the duty of the government to locate it, and it must be presumed to have performed that duty properly. The plaintiff had no interest in the grant or in the land selected under it, and he cannot therefore be heard to question the government's action."

Pico v. *Warner*, 73 Cal., 17.

If Pico had no interest in the Warner grant then *a fortiori* those who had rights under his grant could have no interest in the land in controversy.

SERVIDUMBRES.

The remarkable claim is made by plaintiffs in error that their rights are preserved in the words "servidumbres" contained in the grant. The language of the grant (Tr., fol. 43) is as follows:

"He will be allowed to fence it in, without interference with the roads and other usages (servidumbres.) *He will hold it freely and exclusively*, turning it to agriculture *or any other use*

he may please, and he shall build a house upon it within one year and live in it." Plaintiffs in error contend that the word usages or "servidumbres" refers to the Indians. This conclusion seems untenable. The sentence quoted declares the character of the reservations. It will be noticed that roads were reserved. It matters but little how "servidumbres" is construed. The phrase can only refer to burdens of a similar character to highways. It is intended to cover "sheep walks, cross ways, watering places and services," reserved in the decree of January 4, 1813. This is a clause which we believe was contained in all grants, and we would not dignify the contention with extended argument but for the fact that the learned Chief Justice of the Supreme Court of California in his dissenting opinion holds "that the word 'servidumbres' had a meaning in Spanish law broad enough to include the servitude corresponding to the right of occupancy claimed." Whether this view was shared by Mr. Justice Temple and Mr. Justice McFarland does not clearly appear, but we think nothing is more certain than that rights such as are claimed here by plaintiffs in error cannot be included within the term 'servidumbres' as it was known to the Spanish and Mexican law. We give in the appendix all that is important of Part Third of Title 31 of Las Siete

Partides, using the translation authorized by the legislature of Louisiana, also found in Hall's Mexican law. An examination of this shows that the usages which are intended by this grant are what are called *rustica*, or rural service. A path (*senda*), a carriage way (*carrera*), a road (*via*), are the rural services described in Law 3, and it is the sheep walks (*canadas*) which undoubtedly are intended under the head of servidumbres. If not, then it is a right to water found in Laws 4, 5 and 6.

The contention that the servitude can be a personal service or a *usufruct*, as claimed by plaintiffs in error, involves a curious ignorance of civil law.

A usufruct under the civil law in its highest estate is no more than what under the common law is called a chattel real and therefore not an estate of inheritance. (Kent's Commentaries, Vol. 2, p. 342).

"*Usufructuary, in Civil Law.*—Domat points out the duties of the usufructuary, which are—to *make an inventory* of the things subject to the usufruct, in the presence of those having an interest in them; to *give security* for their restitution when the usufruct shall be at an end; *to take good care of the things* subject to the usufruct; *to pay all taxes* and claims which arise while the thing is in his possession as a ground rent; and to keep the thing in repair at his own expense."

Bouvier's Law Dictionary, Vol. II, p. 1183 (Rawle).

"*Servitude, in Civil Law.*—When used without any adjunct, the word servitude means a real or predial servitude. *Lois des Bat.* p. l., c. l.; Mitch. R. E. & Conv., 49. Real servitudes are divided into rural and urban.

Rural servitudes are those which are due by an estate, such as the right of passage over the serving estate, or that which owes the servitude, or to draw water from it, or to water cattle there, or to take coal, lime and wood from it, and the like."

Bouvier's Law Dictionary, Vol. II, p. 986 (Rawle).

It would be as reasonable to interpret the word "servidumbres" in this grant as personal servitude or slavery, which is its primary definition, as that a usufruct was intended, which under the Spanish and Mexican law was created by a grant or will of the owner of property, and must be less than a freehold.

It is not contended that the rights of the defendant can come under any class than that of usufruct, and this by law 20 is as follows: "The first is where one man grants to another, for the whole of his life, or for a certain time, the usufruct of his estate, house, slaves or cattle, or other things which afford a revenue or fruits. This usufruct may be granted either by contract or will. But the grantee ought to gather the fruits in good faith, first giving security that the land of which he has the usufruct, shall not be lost or deteriorated by his fault, or by gathering therefrom more

than it is proper he should take; and that in case he should die, or the time of his usufruct expire, in any other manner, the thing shall be restored to the grantor, or to the person to whom he might order it to be restored, or to his heirs, if he be dead."

Who has, by contract or will, given these Indians or their ancestors any usufruct in these premises? To whom have they given security that it shall not be lost or deteriorated, and if it was given at all then it has expired years ago by the death of the original possessors, for law 24 explicitly provides that it terminates on the death of the grantee.

The rights claimed by the plaintiffs in error are merely those of permissive occupation of the tract. If any such exists, they are similar in character to those involved in the De Haro case, of which the Court say:

"There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas, a license is a personal privilege; can be conferred by parol or in writing; coveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death

of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it."

De Haro v. *United States*, 5 Wallace, 599; *Bixby* v. *Bent*, 59 Cal., 522.

II.

NO RIGHTS OF ANY KIND WERE RESERVED TO THE INDIANS UNDER THE TREATY OF GUADALUPE HIDALGO.

While it is true that the laws of the United States govern, whether they are or are not consistent with the terms of the treaty, nevertheless since it has been so often said that the Indians have rights under the treaty, it may be well to refer to that instrument. The Treaty of Guadelupe Hidalgo and the subsequent protocol adopted at Queretaro, can be found in "Treaties and Conventions of the United States," constituting Senate Executive Document Number 47, Forty-eighth Congress, second session, pages 681-693, and we print in the Appendix the pertinent parts. The eighth article provides that Mexicans then established in the ceded territory were free at their option to remove therefrom and to retain the property which they possessed therein; and that in the ceded territory property of every kind "now *belonging to the Mexicans* now established there, shall be inviolably respected." The ninth article specifies that all

Mexicans who shall in accordance with the eighth article become citizens of the United States shall be protected in the free enjoyment of liberty, property, etc. The protocol declares that by substituting the third article of the Treaty of Louisiana it was not intended to diminish what was agreed upon in Article nine, *supra;* and it was further recited that the understanding of the American government "is contained in the third article of the Treaty of Louisiana. In consequence, all the privileges and guaranties, civil, political, and religious, which would have been possessed by the inhabitants of the ceded territories if the ninth article of the treaty had been retained, will be enjoyed by them without any difference under the article which has been substituted."

It is also said in the same protocol that "The American government by suppressing the tenth article of the Treaty of Guadalupe did not in any way intend to annul *the grants of lands* made by Mexico in the ceded territories. Those grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the *grantees may cause their legitimate titles to be acknowledged before the American tribunals.* Conformably to the laws of the United States legitimate titles to every description of property, personal and real, existing in the ceded territories, are those which *are*

legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, etc."

The third article of the Treaty of Louisiana is as follows:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of the citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." (Treaties and Conventions, page)

No mention is made in the Treaty of Guadalupe Hidalgo of the Indians except in so far as they are referred to as savages and provision made for mutual protection from their incursions.

The Gadsden Treaty (Treaties and Conventions, page 694) contains nothing affecting the question before us.

It will thus be observed that only the *grantees* of the Mexican government were protected, and that the mere right of occupancy, if any such existed, of Indians, and the general treatment of the savage tribes found no countenance or recognition whatever. Nor is this at all singular. The peculiar system prevailing in Mexico, and the political regulations which that government

saw fit to adopt as to Indians, were not in harmony with the views of the United States; and the latter never undertook to carry out, maintain, or recognize the Mexican plan of dealing with Indians to any extent or at all. We have pursued our own notions in this respect, and whether our plan is or is not a wise one is wholly immaterial. There is no doubt that the Spanish government assumed to conserve certain rights of Indian communities in the field of its American conquests.

White on Indian Sales, 2 White's Recop., 703, *et seq.*

But, says Mr. White, "Book 5, Chap. 16 (Recop. de Las Indias), is on the subject of laws, and goes to show the impossibility of dictating rules to suit every people of the monarchy, and how much must be left to the governors." (Id. p 704).

Thus, in some cases where the country was occupied by independent Indian nations, claiming by boundaries, the title of these nations was recognized, which title had to be extinguished by purchase or cession, before the Spanish grantee could legally obtain possession and title. So it was in Florida and Louisiana, as appears from the citation from White above referred to.

In other places Indian nations were extinguished by conquest, and there remained village communities and individual proprietors, and the

balance of the lands became crown lands. Such, for instance, was the case in New Mexico, and certainly in the valley of Mexico.

Over vast territories roamed predatory tribes who had no fixed habitation. They were not considered as having any proprietary rights, and all the land treated as realengus.

Therefore, we find in all the laws and decrees of "Coahuila and Texas" only the following with regard to Indians:

"The Indians of all nations *bordering* on the State, as well as the wandering tribes *within the same*, shall be admitted in market exempt from all duties in their traffic in the effects of the country; and should any of the same, being attracted in this manner, and by the mildness and confidence with which they shall otherwise be treated, wish to establish themselves in any of the settlements, after declaring themselves in favor of our institutions and religion, they shall be admitted, and share the same quantity of land as the settlers specified in Articles 14 and 15, always preferring native to foreign Indians."

Colonization Law of March, 24th, 1825,

Art. 19;

White's Recop, Vol. 1, p. 456.

None of the laws, ordinances or contracts with regard to Austin's Colony mentions the Indians save by the Art. 19 above specified. No proprietory rights were recognized in the Indians in this vast territory, and hence, there has never been any question of the extinguishment of any Indian title in the Texas courts.

We have already discussed at length the character of the California Indians and shown that there was nothing in their character or condition which would bring them within the terms of the treaty or would preserve their rights. Our proposition is a very simple one. There is no question that a civilized Indian could take under a Mexican grant: *U. S.* vs. *Ritchie*, 17 How. 525, where this Court held that Solano, the grantee in that case (who was a civilized Indian) under the plan of Iguala and the decrees of the Mexican Congress, was a citizen of the Mexican government and competent to take, hold and convey property, and that the Mexican constitution makes no distinction between the Indian and white race in regard to citizenship. Our contention is, that if they come within the term Mexicans, then any rights which they may have must be presented under the Act of Congress March 3rd, 1851; but if their rights grow out of the fact that they were a class dependent on the grace of the government and not bound by the provisions of that act, then they never acquired any rights under the Mexican rule preserved by the treaty, or if they acquired such rights they are lost by the action of our government. No decision is cited or can be cited to show that any rights of this character were preserved by the treaty. It is true, as Chief Justice Marshall declares in *Johnson* v. *M'Intosh*, 8

Wheaton, 543, that the Indians have been held under the system prevalent in the United States to have a just right to retain possession of the soil which they occupy, while the ultimate dominion and the power to grant the soil, although in possession of the natives, rested in the United States; that the right of discovery drew after it as an incident the right of dominion and the right to parcel out and give title to land according to the discretion of the power which held dominion; and that Spain, while she rested her title on the grant of the Pope, yet insisted also on her rights by virtue of discovery; but the decrees which we have cited show that she dealt with the Indians in the exercise of this dominion, distributed them to the holders of grants "in conformity with the taxes," respecting and encouraging their settlement in pueblos and wherever they were adopting the habits of civilization, but nowhere recognizing any right in the soil in nomadic tribes, and that Mexico, after her Declaration of Independence, has recognized no rights in the Mission Indians whatever, except in certain allotments of Mission lands. There is no allegation that this was an allotment of any Mission land or that any such rights were acquired by these Indians, or under the colonization law of Aug. 18, 1824, the regulations of Nov. 21st, 1828, the law of Aug. 17th, 1833, or the rules and instructions thereunder, and if any

such rights were acquired and were preserved by the treaty, then it was as much the duty of these Indians to present their rights as any other Mexican.

It was only grants, and grants which had been perfected that were protected by the treaty of Guadalupe Hidalgo. The care with which our government maintained this contention is shown by the unanimous rejection by the Senate of the 10th article of the original treaty, the circumstances of which are stated by Mr. Justice Lamar in an opinion sustaining the proposition we have announced.

Interstate Land Co. v. *Maxwell Land Grant Co.* 139 U. S., 569.

III.

THE PLAINTIFFS IN ERROR ARE NOT THIRD PARTIES WHOSE RIGHTS ARE SAVED BY THE ACT OF MARCH 3, 1851, BUT THE PATENT AND THE PROCEEDINGS LEADING UP TO IT ARE CONCLUSIVE AGAINST THEM.

We have shown, as we think, that the plaintiffs in error had no rights in the land in question under the Mexican and Spanish rule; that the Indians whose rights were preserved by the Spanish decrees and Mexican laws were of a different class; that the Indians in question were either Indians outside the Mission jurisdiction, and not within the class of Mission or Pueblo

Indians; or if they were Mission Indians then they could acquire no right of occupation in the soil unless by some grant or allotment, which is not shown in this case; that lands of this character, whether formerly occupied by the Missions or not, were subject to grant; that the grant was made; that the Valle de San Jose was adjudicated to be vacant and Warner put in possession; that no reservation was made of any rights of the Indians; and that if they had any right which the Mexican government could enforce, it was of a character which was not protected by the treaty.

There but remains to consider the ground upon which the trial court decided the cause and which was affirmed by the judgment of the Supreme Court of California in the able and exhaustive opinion of Mr. Justice Van Dyke:

"That we are not permitted to go behind the patent is a case like this."

"Neither the grant nor the patent contains anything to support this contention, and there is no privity between them and the grantee, or anything from which a trust could arise in their favor as against his grant or the patent issued thereon. They are not third persons within the meaning of the fifteenth section of the act of 1851, as already shown, but are mere strangers to the record." (*Harvey* v. *Barker*, 126 Cal., 277.)

It hardly seems necessary to add anything to

the opinion of the Court, which disposes of the little which was left of the case of *Byrne* v. *Alas*, upon which plaintiffs in error relied. That case had been already practically overruled by the Supreme Court of California, and the Supreme Court of California in deciding this case held that it could no longer be considered as authority, and showed that the facts in the case of *Byrne* v. *Alas* differed materially from the case at bar, for in *Byrne* v. *Alas* the grant contained a reservation of the rights of the Indians, which is entirely wanting in the grant to Warner.

As the patent was issued in accordance with law it must be construed as to its efficacy, not by the laws of Mexico, but by those of the United States, and it is not in the power of this tribunal to declare that any legislation had by Congress in the execution of treaty rights of the treaty is violative of constitutional power.

In *Botiller* v. *Dominguez*, 130 U. S., 238, it is said:

"Two propositions under this statute are presented by counsel in support of the decision of the Supreme Court of California. The first of these is that the statute itself is invalid, as being in conflict with the provisions of the Treaty with Mexico, and violating the protection which was guaranteed by it to the property of Mexican citizens, owned by them at the date of the treaty; and also in conflict with the rights of property under the constitution and laws of the United

States, so far as it may affect titles perfected under Mexico. The second proposition is that the statute was not intended to apply to claims that were supported by a complete and perfect title from the Mexican government, but, on the contrary, only to such as were imperfect, inchoate, and equitable in their character, without being a strict legal title.

"With regard to the first of these propositions it may be said that so far as the act of Congress is in conflict with the Treaty with Mexico, that is a matter in which the Court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to enforce upon another the obligations of a treaty. This Court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. The Cherokee Tobacco, 78 U. S., 11 Wall., 616; *Taylor* v. *Morton*, 2 Curtis, 454; Head Money Cases, 112 U. S., 580, 598; *Whitney* v. *Robertson*, 124 U. S., 190, 195."

There can be no issue here as to what the law of Mexico authorizes, unless that law was carried into and made a part of the statutory enactments of the United States. The United States as a sovereign had the power to do whatever it chose with the property acquired from Mexico regardless of any treaty stipulations.

Stephens v. *Cherokee Nation*, 174 U. S., 445.

Thomas v. *Gay*, 169 U. S., 264.

Choctaw Nation v. *United States*, 119 U.S., 1.

Whatever moral obligation on the part of the United States there may be, its power to deal with the Indians and grant title to their land without their consent is undoubted. The same great Judge who delivered the opinion in *Botiller* v. *Dominguez* has vindicated this principle in discussing the power of Congress to deal with the Indians irrespective of treaty compact relations.

United States v. *Kagama*, 118 U. S., 375.

And this Court has declared that even against the consent of the Indians who were parties to the treaty the power exists in Congress to invade the sanctity of a reservation and disregard the guaranties contained in the treaty, and dispose of the land included in the reservation.

Spalding v. *Chandler*, 160 U. S., 394.

The same proposition has been affirmed by this Court in reference to grants to railroads given not only the fee but the right of possession.

Missouri, K. & T. R. R. v. *Roberts*, 152 U. S., 114.

And in terms laid down by Judge Hanford in the District Court.

United States v. *Alaska Packing Co.*, 79 Fed. Rep., 152.

United States v. *Four Bottles Sour Mash Whiskey*, 90 Fed., 720.

Mr. Justice Miller, in his opinion already cited (130 U. S., 243), says: "This was a transfer of the political dominion and of the proprietary interest in this land; but the government of Mexico had caused to be inserted certain provisions intended for the protection of private property *owned by Mexicans*" (not claimed by Indians) "within this territory at the time the treaty was made; and it may be conceded that the obligation of the United States to give such protection, both by this treaty and by the law of nations, was perfect."

This obligation referred to by Mr. Justice Miller was, of course, a moral one only, incapable of enforcement except save through appropriate action by this government. (See opinion p. 247.) It is manifest that the object was to protect those Mexicans who actually *owned* an interest in property in this country under the then existing laws, *and that neither treaty or Congressional act* was designed for the benefit of the Indians who did not own such an interest.

Here, therefore, is the obligation upon all who claim *any* right or title to present the same.

If the Indians ever had any valid claim, which we deny, they could not escape this requirement. And this is further shown in the opinion of Mr. Justice Miller already cited. He proceeds to show by Article XI of the Treaty of Guadalupe Hidalgo the character of California at the time

of its colonization: "In a wild state of nature, with very few resident white persons, and very little land cultivated within its limits"; to show the change brought about by the discovery of gold and the necessity of settling the validity of claims of private individuals within its boundaries, for which purpose the Act of March 3, 1851, which was entitled, "An Act to Ascertain and Settle the Private Land Claims in the State of California," was passed, the first section of which declares it is for the purpose of ascertaining and settling private land claims, and the eighth "that *each and every person* claiming lands in California by virtue of *any right or title derived from the Spanish or Mexican government shall present the same* to the said Commissioners." (Italics are those of Mr. Justice Miller.) That this imposed an objection upon all who claimed *any right or title to present the same.* This conclusion is fortified by citing in full Sections 11, 12 and 15, to illustrate the necessity of all claims being presented.

If the Indians ever had any valid claim, which we deny, they could not escape this requirement.

Their claim is that under the laws of Mexico they are possessed of an interest, and this claim is met by the opinion of this Court (p. 248) as follows:

"In all this there is no hint or attempt at any

distinction as to the claims to be presented, between those which are perfect and those which are imperfect in their character. On the contrary, the language of the eighth section is as precise and comprehensive as it could well be made, in that it includes every person claiming lands in California, 'by virtue of any right or title derived from the Spanish or Mexican government.'"

We again quote from the same opinion (p. 248):

"The fifteenth section declares that the final decrees rendered in such cases, or any patent issued under the 'act' shall be conclusive between the United States and on the claimants, but it shall not conclude the rights of anybody else, if in a position to contest the action of the board."

Are those Indians in a position to contest the action of the board? Manifestly not. Had they appeared before the Land Commission they would not have based their claim upon the grant to Warner.

Quoting from Chief Justice Taney, this Court proceeds (p. 252):

"It will be seen from the quotations we have made, that the 8th section embraces *not only inchoate or equitable titles*, but *legal titles also*, and required them *all* to undergo examination and to be passed upon by the Court. The object of this provision appears to be, to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of the country, in a manner and form that will prevent future controversy."

If the act "requires them *all* to undergo ex-

amination" how can the defendants pretend that their title was such that it was not necessary to submit it to the tribunal established for the purpose of passing upon it?

In *U. S.* v. *Fossatt*, 21 How. 447; also quoted in the Botiller case, it is said:

"The matter submitted by Congress to the inquiry and determination of the board of commissioners by the act of the 3d of March, 1851, are the claims 'of each and every person in California, by virtue of any right or title derived from the Spanish or Mexican government'."

Commenting upon this expression, Justice Miller says:

"And it will be at once understood that these comprehend all private claims to land in California."

The same learned justice (p. 254) cites with approval the views of the Supreme Court of California in *Teschemacher* v. *Thompson*, 18 Cal., 11, as follows:

"By the act of March 3rd, 1851, the government has afforded the means of protecting all titles, legal or equitable, acquired previous to cession."

Knight v. *U. S. Land Association*, 142 U. S., 161, is an instructive case. On that appeal the judgment of the Supreme Court of California was overturned, and there is much to be found in the opinion there confirmatory of our contention here. Said the Court (p. 188), citing *Beard* v. *Federy*, 3 Wall., 491:

"When informed by the action of its tribunal and officers that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent."

And the concluding words of the opinion (p. 189), contain this significant phraseology:

"No construction which will lead to such results can be given to the fifteenth section (meaning the fifteenth section of the act of 1851, for the purpose of ascertaining and settling private land claims in California.) The term 'third persons' as there used, does not embrace all persons other than the United States and the claimants, but *only those who hold superior titles*, such as will enable them to resist successfully any action of the government in disposing of the property."

In the Maxwell Land Grant case this Court in discussing a confirmation by Congress under the treaty of Guadalupe Hidalgo held, that upon such confirmation by Congress, acting in its sovereign capacity, the validity of the grant is no longer within the judicial power to con-

trovert (121 U. S. 366). Commenting on this the Court say in one of the later cases:

"The action of Congress in confirming it and the subsequent proceedings in the land department, together with the proceedings in the courts to set aside the patent, have certainly settled those questions forever. True, those proceedings do not estop a party claiming the same land under a prior grant from the Mexican government. But, to succeed in his claim, he must recover on the strength of his own title. In other words, he must establish the validity of his own grant in order to defeat a subsequent grant which has been adjudged valid in proper legal proceedings. The confirmation and patenting of the grant in Beaubien and Miranda operated to divest the United States of all their rights to the land embraced in the grant which this country acquired from Mexico by the treaty of Guadalupe Hidalgo. And the only way that the grant can be defeated now is to show that the lands embraced in it had been previously granted by the Mexican government to some other person."

Interstate Land Co. v. *Maxwell Land Grant Co.*, 139 U. S., 569.

This language was afterwards cited with approval by Mr. Justice Brewer, in the case of *Russell* v. *Maxwell Land Grant Co.*, 158 U. S., 253.

Hence, in view of the fact that the Supreme Court has decided in the Botiller case that a person who has not presented his claim to the Board of Land Commissioners has no such title "as will enable him to resist successfully any action

of the government in disposing of the property," does not such non-presentation remove him from the class referred to in the act of 1851 as "third persons?" Not only have defendants no "superior" title, but they have no title at all.

This construction is materially strengthened and made, if possible, more manifest by the opinion of Justice Field in Knight's case, p. 203, where, after showing that a patent is *not merely a quit-claim*, as contended here by the defendants, he says:

"The patent being thus conclusive, can only be resisted by those who hold paramount title to the premises from Mexico antedating the title confirmed, that is, by persons who can successfully resist any action of the United States in disposing of the property or in perfecting the title of the claimant."

This is the construction placed by this learned and experienced Justice upon the fifteenth section of the Act of March 3, 1851, and is also his interpretation of *Beard* v. *Federy*, *supra*.

Hence, it invariably follows that unless the defendants are in such a position that they can stand upon their title and maintain it against the United States, they can claim nothing because of the fifteenth section of the act so often mentioned. While it is important that a patent should be conclusive evidence as against those claiming under the government by title subsequent, it is also plain that a patent should be

sufficiently potential to resist those claiming under the government by an antecedent title not presented to the Board of Land Commissioners. The time has passed for any adjudication upon unpresented land grants.

The cases which we have cited are reviewed and affirmed in the case of *DeGuyer* v. *Banning*, 167 U. S., 723, where the Court held that the survey and the patent were conclusive, against the plaintiff, that land was not included within the grant.

The construction which we give to *Botiller* v. *Dominguez* in reinforced by the opinion of Mr. Justice Field, rendered in *Houston* v. *City and Co. of S. F.*, 47 Fed. Rep., 339:

"The cause of action is the alleged grant of the premises by officers of the former Mexican government to one Fernando Machina and mesne conveyances under him. The alleged grant, if ever one existed, was not presented for examination and confirmation to the Board of Land Commissioners for the settlement of private land claims in California under the act of Congress of March 3, 1851. The land embraced within the alleged grant thus became, by the expressed declaration of Congress in that act, which was passed to carry out our treaty obligations with Mexico, and by the decisions of the Supreme Court of the United States thereon, public land, no longer subject to any private ownership by virtue of the grant. Section 13 of that act declares that all lands, the claims to which have been finally rejected by the Commissioners, as therein provided, 'or which shall be finally decided to be invalid by the District or Supreme

Court, and all lands, the claims to which shall not have been presented to the said Commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States,' 9 St. U. S., 633. In *More* v. *Steinbach*, 127 U. S., 81, 8 Sup. Ct. Rep., 1067, it was held by the Supreme Court of the United States that 'the ascertainment of existing claims was a matter of vital importance to the government in the execution of its policy respecting the public lands, and Congress might well declare that a failure to present a claim should be deemed an abandonment of it and that the lands covered by it should be considered a part of the public domain.' And in *Botiller* v. *Dominguez*, 130 U. S., 255, 9 Sup. Ct. Rep., 525, that Court said: 'We are quite satisfied that upon principle, as we have attempted to show, there can be no doubt of the proposition that no title to land in California dependent upon Spanish or Mexican grants can be of any validity has not been submitted to and confirmed by the board provided for that purpose in the act of 1851, or, if rejected by that board, confirmed by the District or Supreme Court of the United States."

It will thus be observed that Justice Field declared that *Botiller* v. *Dominguez* means precisely that which we have asserted it does mean. The grant upon which the defendants rely does not purport to be a grant under Warner or his successors, and defendants cannot claim any benefit from the confirmation to Warner. Their position is similar to that of the parties referred to by Justice Field, who, he declared, "could in no respect claim any benefit under the confirma-

tion of a pueblo title." This view is absolutely antagonistic to that dictum in *Byrne* v. *Alas*, that, "confirmation relieved the defendants of the necessity of presenting their claims." A party having a valid claim to land under the Mexican dispensation was bound to present the same for adjudication. The decision in *Byrne* v. *Alas* was grounded upon the theory that the Indians were possessed of title adequate to defeat the patent, and were therefore "third parties" within the meaning of the act of Congress of 1851; but when the Federal tribunal determined that no person was exempt from presenting his claim to the Board of Land Commissioners, the foundation of *Byrne* v. *Alas* was withdrawn. Said the Supreme Court of the United States in *More* v. *Steinbach*, 127 U. S., 81: "But independently of this consideration, and assuming that the title under the grant was perfect, the obligation of the grantee was none the less to present his claim to the Board of Land Commissioners for examination."

THE JUDGMENT OF THE LAND COMMISSIONERS AND THE DISTRICT COURT IS CONCLUSIVE THAT THERE WERE NO PERSONS ENTITLED TO SUPERIOR RIGHTS.

The United States having then the title to the premises in controversy, except as against Warner, and the absolute right of disposing of it

excepting as against his grant, proceeded under the Treaty of Guadalupe Hidalgo to determine the status and condition of the land in question and established a tribunal which, under the laws, usages, and custom of the government through which the claim was derived, the principles of equity and the decisions of the Supreme Court of the United States, it determined in favor of Warner, granting him title to the land free and clear of any claim.

Justice Campbell in answering the question, what matters it was the business of the Land Commissioners to determine, says:

"It is obvious that the answer to this question must depend in a great measure upon the state and condition of the evidence. It may present questions of the genuineness and authenticity of the title, and whether the evidence is forged or fraudulent; or, it may involve an inquiry into the authority of the officer to make a grant, or whether he was in the exercise of the faculties of his office when it was made; or it may disclose questions of the capacity of the grantee to take, or whether the claim has been abandoned or is a subsisting title, or has been forfeited for a breach of condition. Questions of each kind here mentioned have been considered by the Court in cases arising under the law. But, in addition to these questions upon the validity of the title, there may arise questions of extent, quantity, location, boundary, and legal operation, that are equally essential in determining the validity of the claim."

United States v. *Fossatt*, 21 How., 446.

It is, therefore, the affair of the officers of the

United States to investigate all subjects involving the validity of the grant. Continuing, the Court say: "In affirming a claim to land under a Spanish or Mexican grant to be valid within the law of nations, the stipulations of the Treaty of Guadalupe Hidalgo, and the usages of those governments, we imply something more than that certain papers are genuine, legal, and translative of property. We affirm that the *ownership and possession* of land of definite boundaries rightfully attach to the grantee." (*U. S.* v. *Fossatt*, *ubi supra*.) The opinion in the latter case was cited by Mr. Justice Field with approval in the case of *More* v. *Steinbach*, *supra*, and he observes:

"Trust relations respecting the property between the patentee and others may be enforced equally with such relations between him and others respecting any other property; but until the patent is set aside or modified by proceedings taken at the instance of the government, all the questions necessarily involved in the determination of a claim to land under a Spanish or Mexican grant and in establishing its boundaries, are concluded by it in all courts and proceedings, except as against parties claiming by superior title such as would enable them to resist successfully any action of the government in disposing of the property. The confirmation takes effect, by relation, as of the date of the first proceeding commenced before the Land Commissioners; and an adjudication that at that date it was valid is also an adjudication that it was valid at the date it was made. And the patent which follows the confirmation and approved survey, and is a mat-

ter of record, is itself evidence of the regularity of preliminary proceedings. As was said in *Beard* v. *Federy*, 70 U. S., 3 Wall., 478, 492, 'by it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie.' "

In the language of Mr. Justice Campbell the decisions of the Land Commissioners and of the District Court, in affirming our grant, affirmed "That the possession of the land of definite boundaries rightfully attach to Warner," and as there are no trust relations between the plaintiffs in error and the grantee, and they have no title which they have presented to the land tribunal, they are in no position to contest our right, even if they had pleadings upon which to base such a contest. "The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers or of their superior in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties." (*Quinby* v. *Conlan*, 104 U. S., 425.)

Said the Supreme Court of the United States *U. S.* v. *Castillero*, 2 Black, 158:

"Power to decide upon the validity of any claim presented to land in California by virtue of any right or title derived from the Spanish or Mexican government as matter of original jurisdiction, is by the act of March 3rd, 1851, exclusively conferred upon the Commissioners appointed under the first section of that act."

In *Newhall* v. *Sanger*, 92 U. S., 761, it was said, in speaking of the statute of 1851, that claims, whether grounded upon inchoate or perfected title, were to be ascertained and adequately protected.

It must be remembered that Warner's petition recites that the land is vacant. (Tr., fol. 39.)

In issuing the patent, therefore, it was adjudged that the land was vacant. To controvert this finding is to assail a patent in a collateral proceeding, which cannot be done.

A later expression of this Court upon this subject is to be found in *United States* v. *California, etc., Land Co.*, 148 U. S., 43, citing *United States* v. *Arredondo*:

"The only question which can arise between an individual claiming a right under the acts done and the public, or any persons denying its validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officers, whether executive (1 Cranch, 170, 171), legislative (4 Wheat., 423; 2 Pet., 412; 4 Pet., 563), judicial (11 Mass., 227; 11 S. & R., 429; adopted in 2 Pet., 167, 168), or special (20

Johns, 739, 740; 2 Dow., P. C., 521, etc.), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal is prescribed by law. See also the following cases: *Foley* v. *Harrison*, 15 How., 433, 448; *Johnson* v. *Towsles*, 13 Wall., 72, 83; *Smelting Company* v. *Kemp*, 104 U. S., 636; 640; *Spelpley* v. *Cowan*, 91 U. S., 330, 340; *Moore* v. *Robbins*, 96 U. S., 530, 535; *Quinby* v. *Conlan*, 104 U. S., 420, 426; *Steel* v. *Smelting Co.*, 106 U. S., 447, 450; *Lee* v. *Johnson*, 116 U. S., 48, 51; *Wright* v. *Roseberry*, 121 U. S., 488, 509."

This doctrine has been applied to land titles in New Mexico, confirmed by Congress, where confirmed by an act of Congress, and the same principle is enunciated by the Court.

"By article 8 of the treaty of Gaudalupe Hidalgo, and article 5 of the Gadsden treaty, the property of Mexicans, within the territory ceded by Mexico to the United States, was to be 'inviolably respected', and they and their heirs and grantees were 'to enjoy with respect to its guaranties equally ample, as if the same belonged to citizens of the United States.' 9 Stat. at L., 929, 930; 10 Stat. at L., 1035.

"Undoubtedly private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. But the duty of providing the mode of securing these rights, and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the government; Congress might either itself discharge that duty or

delegate it to the judicial department. *De la Croix* v. *Chamberlain*, 25 U. S., 12 Wheat., 599, 601, 602; *Chouteau* v. *Eckhart*, 43 U. S., 2 How., 344, 374; *Tameling* v. *United States Freehold & E. Co.*, 93 U. S., 644, 661; *Botiller* v. *Dominguez*, 130 U. S., 238.

"For the adjustment and confirmation of claims under grants from the Mexican government of land in New Mexico and in Arizona, which was formerly a part of it, Congress had not, when this case was decided below, established a judicial tribunal as it had done in California, and as it has since done in New Mexico and Arizona, by the Act of March 3, 1891, Chap. 539 (26 Stat. at L. 854.)

"But Congress reserved to itself the determination of such claims; and enacted that the surveyor-general for the territory, under the instructions of the Secretary of the Interior, should ascertain the origin, nature, character and extent of all such claims; and for this purpose might issue notices, summon witnesses, administer oaths and do all other necessary acts; and should make a full report on such claims, with his decision as to the validity or invalidity of each under the laws, usages and customs of the country before its cession to the United States; and that his report should be laid before Congress for such action thereon as might be deemed just and proper, with a view to confirm *bona fide* grants, and to give full effect to the treaty of 1848 between the United States and Mexico. Acts of July 22, 1854, Chap. 103, Sec. 8 (10 Stat. at L., 304); July 15th, 1870, Chap. 292 (16 Stat. at L., 300).

"In *Tameling* v. *United States Freehold & E. Co.* above cited, it was therefore held that the action of Congress, confirming, as recommended by the surveyor-general for the territory, a private land claim in New Mexico, was conclusive of the evi-

dence of the claimant's title, and not subject to judicial review; and Mr. Justice Davis, in delivering the opinion of the Court, said: 'No jurisdiction over such claims in New Mexico was conferred upon the Courts; but the surveyor-general, in the exercise of the authority with which he was invested, decides them in the first instance. The final action on each claim, reserved to Congress, is, of course, conclusive, and therefore not subject to review in this or any other forum. It is obviously not the duty of this Court to sit in judgment upon either the recital of matters of fact by the surveyor-general, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before Congress for its consideration and action.' 93 U. S., 662. See also *United States* v. *Maxwell Land Grant Co.*, 121 U. S., 325, 366; 122 U. S., 365, 371.

"The action of Congress, when taken, being conclusive upon the merits of the claim, it necessarily follows that the judiciary cannot act upon the matter while it is pending before Congress; for if Congress should decide the same way as the Court, the judgment of the Court would be nugatory; and if Congress should decide the other way, its decision would control."

Astiazaran v. *Santa Rita Land & Mining Co.*, 148 U. S., 80.

The same conclusion was reached by this Court in a case where the title to an Indian pueblo had been confirmed by an act of Congress, citing the Tameling and Maxwell Land Grant cases, and again where a mining grant had been similarly confirmed and patent issued.

United States v. *Conway*, 175 U. S., 60;
Real De Delores del Oro v. *United States*, 175 U. S., 71.

Apparently this Court found difficulty in coming to the conclusion that even a complete and perfect grant of land in New Mexico could be asserted as against an adverse private claimant in the courts of justice without being confirmed, holding that the Act of 1891 is permissive and does not compel the submission of claims for confirmation. But, says Mr. Justice Gray, "A grant of land in New Mexico, which was complete and perfect before the cession of New Mexico to the United States, is in the same position as was a like grant in Louisiana or in Florida, and is not in the position of one under the peculiar acts of Congress in relation to California, and may be asserted, as against any adverse private claimant, in the ordinary courts of justice."

Ainsa v. *New Mexico & A. R. Co.*, 175 U. S., 76, 90.

The same opinion, quoting Mr. Justice Trimble in a leading case, speaking of the obligations of the United States under the Gadsden Treaty, says: "'While the government has admitted its obligation to confirm such inchoate rights or concessions as has been fairly made, it has maintained that the legal title remained in the United States until, by some act of confirmation, it was passed or relinquished to the claimants. It has maintained its right to prescribe the forms and manner of proceeding in order to obtain a confirmation, and its right to

establish tribunals to investigate and pronounce upon their fairness and validity.' *De la Croix* v. *Chamberlain* (1827), 12 Wheat., 599, 601, 6 L. ed. 741, 742. Even grants which were complete and perfect at the time of the cession may be required by Congress to have their genuineness and their extent established by proceedings in a particular manner before they can be held to be valid." (175 U. S., 79.)

The learned Justice after reviewing the provisions of the Treaty of Guadalupe Hidalgo and the Act of March 3rd, 1851, concludes: "This court held that this provision included perfect as well as inchoate titles, and that consequently no suit could be maintained in a court of the state of California *on any Spanish title whatsoever*, if it had not been presented to the commissioners in accordance with the act of Congress. *Botiller* v. *Dominguez*, (1889). 130, U. S., 238." (175 U. S., 84.)

Nor is the length of possession any evidence of title.

Chavez v. *United States*, 175 U. S., 509.

The De Haro case, which we have cited under another head, is also cited in a recent case involving the question of title from evidence of possession and holding that the character of such possession must be inconsistent with merely permissive occupation. Citing *Serrano* v. *United States*, 5 Wall. 461, Mr. Justice Peckham

says: "While under the Civil law, including Spanish law, one might prescribe beyond his title he cannot do so contrary to the title."

Peabody v. *United States*, 175 U. S., 546, 551.

In another recent case Mr. Justice White discusses the rules and regulations of November 28th, 1828, and illustrates from a *resume* of the decided cases the care which the Mexican government exercised in making grants of land and preserving the record of the same with the conditions of their grant, and concludes a review of the decisions under the California act with a statement that "it was necessary that a grant should be evidenced by an act of the government clearly and unqualifiedly conveying the land intended to be granted, and a public record in some form was required to be made of such grant."

United States v. *Elder*, 177 U. S., 119.

These cases show that this Court has no jurisdiction to entertain any claim made by plaintiffs in error in view of the decision of the Land Commissioners confirming the grant without reservation, since it was necessary that their rights should pass through the sieve of the land commission before they could be made the subject of adjudication by the ordinary courts of justice.

An examination of the Act of March 3, 1851, strengthens this conclusion. It was an act not only to ascertain but to "settle" private land claims in the State of California, and the title and character of it and the act supplemental thereto show that it was the intention of Congress to effectually settle and clear from any cloud the titles which were granted. Moreover, provision is made in section 4 for the appointment of an agent, learned in the law and skilled in the Spanish language, to superintend the interests of the United States in the premises, to whom notice of all depositions must be given, or to the district attorney of the district, and by section 9 the district attorney of the United States is to appear; and that the Indians were not forgotten is shown by section 16, by which it is made the duty of the Commissioners to report what lands are occupied and cultivated by pueblos or rancheros Indians. If then, the United States has an interest now in protecting the rights of the plaintiffs in error, certainly it was more their duty to preserve those rights before the Land Commission, and the United States having been represented before the board the adjudication of the Court is conclusive that there were no rights reserved to the Indians.

THE SURVEY IS CONCLUSIVE AGAINST ANY COLLATERAL ATTACK.

Not only did the plaintiffs in error have the

opportunity to present their claims before the Mexican government and the Land Commission and to resist the confirmation of the grant without the reservation of their rights, if any such existed, but if these are not conclusive upon them they still could have objected to the survey, for it was the duty under the act of July 1st, 1864, to give public notice of the survey and plat, and objections could have been made within ninety days "by any party claiming to have an interest in the tract embraced by the survey," and the Commissioner of the General Land Office could require, if the ends of justice would be subserved, a further report and proofs to be taken, or he could direct a new survey. The survey in question showed no trace of any Indian rights either upon the plat or in the field notes, and clearly included all the land in question. As there is no evidence that it had been surveyed under the Mexican government and juridical possession given, this was a duty which the United States government had assumed, and was, by virtue of the survey, carrying out; and the approval of the survey and the legal right to exclusive possession which followed under it excluded any possibility of the reservation of any rights in the plaintiffs in error. If the previous proceedings were not notice to them and did not extinguish their rights, this was their day in court, and this worked an extinguishment of such rights.

Therefore, it was the affair of the officers of the United States to investigate all subjects involving the validity of the grant.

"It follows from what is thus said that it would be a sufficient answer to the contention of the defendants that the grant under which they claim to have acquired a perfect title conferred none. The grantees were not invested with such title, and could not be without an official delivery of possession under the Mexican government; and such delivery was not had and could not be had after the cession of the country, except by American authorities acting under a law of Congress." (*More* v. *Steinbach*, *supra*.)

The case of *Stoneroad* v. *Stoneroad*, 158 U. S., 240, establishes the proposition that even without notice all parties are bound, even if some were minors and some were under coverture, and the same case holds, citing *Knight* v. *United Land Association*, 142 U. S., 161, that the power of segregating and surveying public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding.

In another case in the same volume the courts cite with approval *Cregin* v. *Powell*, 128 U. S., 691; *Beard* v. *Federy*, 3 Wall., 492; and *More* v. *Steinbach*, 127 U. S., 83, as to the conclusiveness of the patent, and say:

"These authorities are decisive upon this question. And in the nature of things a survey

made by the government must be held conclusive against any collateral attack in controversies between individuals. There must be some tribunal to which final jurisdiction is given in respect to the matter of surveys, and no other tribunal is so competent to deal with the matter as the land department. None other is named in the statues. If in every controversy between neighbors the accuracy of a survey made by the government was open to question interminable confusion would ensue."

Russell v. *Maxwell Land Grant Co.*, 158 U. S., 253, 258.

THE ACTION OF THE GOVERNMENT OF THE UNITED STATES RESULTING IN THE ISSUANCE OF A PATENT IS CONCLUSIVE THAT THERE WERE NO PERSONS ENTITLED TO SUPERIOR RIGHTS.

This is the ground upon which the case was decided in the California courts, and, as we have said, we can add little to the exhaustive opinion of Mr. Justice Van Dyke, printed in the transcript, in which the Court holds that there is no privity between the plaintiffs in error and the grantee, or anything from which a trust could arise in their favor; that they are not third persons, are mere strangers to the record, and that the patent is conclusive of the case against them.

Said Justice Field, speaking for the Court in *Smelting Co.* v. *Kemp*, 104 U. S., 640:

"The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be

lawfully performed only after certain steps have been taken, that instrument duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands under the law is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

In *Knight* v. *U. S. Land Association*, *supra*, the same Justice said:

"The attempt is futile to use these cases (*Doolan* v. *Carr* and similar decisions) or in any other case to establish the proposition that if an error can be shown in the action of an officer of the Land Department in a matter subject to its jurisdiction, the proceeding of the officer may be treated as a nullity and the patent issued thereon may be collaterally assailed. This view is untenable and does not merit serious consideration."

As Warner's petition recited that the land was vacant and the patent was issued for the land, to controvert this allegation is to assail the patent in a collateral proceeding.

If the plaintiffs in error had presented their claim and a patent had issued to them a case might arise for the adjudication of this Court as to the priority right; but, as we have said, the Supreme Court of the United States has never recognized the right of a party claiming under Mexican or Spanish laws, who has not presented his claim to the board of Land Commissioners to

attack a patent, issued upon a decree based upon an independent and hostile grant.

Adams v. *Norris*, 103 U. S., 593; *Beard* v. *Federy*, 3 Wall., 478; *Henshaw* v. *Bissel*, 18 Wall., 225; *Miller* v. *Dale*, 92 U. S., 473; *Townsend* v. *Greely*, 5 Wall., 335; present instances where the dispute arose between those holding conflicting patents, or between the holder of a patent and a party claiming that because of previous trust relations the legal title was held for his benefit.

In *Henshaw* v. *Bissell*, 18 Wall., 255, it is said:

"Whenever two surveys covering the same tract are approved by the political department, and a legal controversy arises respecting the land between the claimants under the different surveys, the question which of the two surveys appropriates the premises in dispute is necessarily transferred to the judiciary. The fact that two surveys embrace the same land is itself proof that either one of the original concessions was improvidently issued and to the extent of its interference with the other was inoperative, or that error has intervened in one of the surveys."

The Court then proceeds to more fully draw the distinction between a case where one party claims under a patent and the other in hostility to such grant:

"But in this case both parties stand upon patents; both have in these instruments the conveyance of the government."

On page 265, same opinion, it is said, com-

menting upon certain cases cited in plaintiff's brief:

"The patent, treated merely as the deed of the government, is held in these cases to have the operation of a quit-claim, or rather, of a conveyance of such interest as the United States possessed in the land, and to take effect by relation at the time when proceedings were instituted before the board of Land Commissioners. The patent is also held in those cases to be record evidence of the action of the government upon the claim of the patentee under the Mexican grant, establishing without other proof the validity of the claim and its rightful location."

And in *Harrison* v. *Ulrich*, 39 Fed. Rep., 655, it is said:

"The patents were not issued until those concessions had been recognized by the tribunals of the United States as genuine, and as conferring a right or equity upon the respective claimants, which was entitled to protection under the act of March 3, 1851. It was not the purpose of that act, or of the proceedings under it, to supersede rights or equities relating to lands conferred by the former government, but to confirm and protect them by giving the holder such a record or documentary evidence of their validity as would enable him to enforce them in the Courts of the country."

From this it obviously results that if those who had rights and equities as against the former government declined to have the same adjudicated by the Land Commission, they ceased to have any claim, whether the premises were or were not patented to another.

The learned judge who wrote the opinion in the Supreme Court of California, quoting the language of Mr. Justice Field in *Houston* v. *San Francisco*, cited by us and the decision in *More* v. *Steinbach*, *ubi supra*, holding the doctrine that the laws of a ceded country remain in force after the cession, is not applicable to laws concerning the alienation of any portion of the public domain, says:

"In this case, therefore, if any rights whatever can be conceded to the appellants, under the former Mexican government, such rights were in the nature of private property, or a right dependent upon the will and pleasure of the state or nation. If, as claimed, it were a right to possess, occupy and use land, that amounted to a title to property. It being a title or right to property, whether in fee simple or possessory merely, derived from the Mexican government, under the act of Congress of 1851, as repeatedly held, a claim to that right was required to be presented for confirmation. If, on the other hand, it were a mere license at the pleasure of the former government to occupy the land, such right would not prevent that government from granting the land unincumbered with such right. This was the case in reference to pueblos under the former regime. The pueblos held title in trust for the use of the inhabitants, not conferred by special grant, but under the laws and regulations of Spain and Mexico, and there were many cases where such governments made specific grants within the territorial limits of the pueblos which were, after the change of government, confirmed and patented by the United States, under the act of Congress of 1851. The United States succeeding to all the rights and sovereignty of

Mexico, had such power to grant all public lands —that is, all lands not claimed by private parties, and not presented for confirmation, the claims were waived or forfeited, and such lands thereafter became public lands."

Harvey v. *Barker*, 126 Cal., 274.

Said Mr. Justice Field in a case involving the title to Mission lands: "The patent is something more than a mere conveyance of the government. It is evidence, having a force and operation of the record that the title claimed was valid, or at least entitled to recognition and confirmation at the time the sovereignty of Mexico over the country was superseded by the United States."

Foster v. *Mora*, 3 Sawyer, 46.

Mr. Justice Miller in affirming the case of *Foster Mora* in this Court, says: "It is also contemplated as the final evidence of title that a patent should issue to the claimant or his representatives when the claim was established in whole or in part."

Foster v. *Mora*, 98 U. S., 425.

In another case Justice Field, in discussing the obligation of the government under the treaty, which he declares to be political in character, and the necessity of presenting all claims, says: "Final confirmation as defined by the act is deemed to be the patent from the United States."

Montgomery v. *Bevans*, 1 Sawyer, 653.

It is said that the plaintiffs in error are third

parties within the meaning of that act, and we will consider this under a separate head.

THE TRUE CONSTRUCTION OF THE ACT OF MARCH 3, 1851, AS TO THIRD PARTIES.

We claim that the 15th section of the act in question, reserving the rights of third parties refers to those only who have placed themselves in a position to justify the assertion of a claim against the government of the United States; and that, although the defendants might have had a valid claim under the law of Mexico (a proposition which the facts do not sustain), nevertheless their claim not having been recognized by the Board of Land Commissioners, and nothing appearing to show that any trust relation exists which would justify acquiring the legal title from the defendants, there is no merit in the contention that the defendants are third parties within the meaning of the said act; but, on the contrary, they are mere strangers to the record. In the Knight case (142 U. S., 203) it is said: "The patent being thus conclusive can only be resisted by those who hold a paramount title to the premises from Mexico antedating the title confirmed." But, as we have seen, there cannot be any paramount title from the Mexican government except such title as is evidenced by the decree of the Board of Land Commissioners and subsequent proceedings under the act of March 3, 1851.

In *Harrison* v. *Ulrich*, 39 Fed. Rep., 654, Mr. Justice Field said:

"However conclusive against the United States and parties claiming under them by title subsequent a patent may be, it in no respect impairs the right of the previous patentee to contest the right upon which the subsequent patent has been issued for the same premises. Every patent issued upon a preferred claim under the act of March 3, 1851, in terms declares that it shall not affect the rights of third parties; that is, those who have a standing to contest the pretentions of the patentee had no patent been issued."

If no patent had been issued to Warner could the Indians, whose pretentions are the subject of this litigation, maintain a claim in the face of the fact that they have never appeared before the Board of Land Commissioners? This interrogatory is answered by the decision in *Botiller* v. *Dominguez*, and the subsequent cases in this Court and in California following it, culminating with *Los Angeles F. & M. Co.* v. *Thompson*, 117 Cal., 594, and the case at bar.

Counsel appear to think that because Warner obtained a patent for the disputed premises that therefore the Indians were absolved from applying for the same, and that they are not and cannot be compelled to take any steps to perfect their claims. But if the Indians are third persons it must be because they hold by superior title. The ground of their contention is a supposed right derived from Mexico, but such title

avails nothing unless it has been approved. There can be no "superior title" which has not passed the scrutiny of the board. If the plaintiffs in error had a perfect title under the laws of Mexico, and had neglected to present that perfect title, they would have no right now to assert the same. Their position cannot be improved merely because Warner, acting for himself and in hostility to the Indians, procured a patent to be issued.

Ohm v. *San Francisco*, 92 Cal., 437, 454.

De La Guerra v. *Santa Barbara*, 117 Cal., 528, 532.

" We start with the title of petitioner at that date (presentation of the petition for confirmation) and titles subsequently derived from him in any legal mode, are valid, no matter to whom the patent is subsequently issued."

McDonald v. *McCoy*, 121 Cal., 55, 67.

But it does not inure to one where title is not so derived, or in whose favor no trust is created by the recitals in the patent. (*McDonald* v. *McCoy*, *ubi supra*).

The title thus confirmed and patented to him did not inure to any person claiming under any rights other than a grant from him.

City of Los Angeles v. *Pomeroy*, 125 Cal., 426.

If plaintiffs in error had presented themselves before the Land Commission and had procured an approval of their claim, and such approval had ripened into a patent, it would then be competent and proper for the Court to pass upon the respective petitions of the patentees. If Warner occupied a position in any way fiduciary and a proper pleading was before this Court with reference to the same, then the Indians might have the benefit of Warner's grant. But they do not claim under that grant, nor are there any pleadings in this action, or any evidence upon which such a claim could be be based. (*City of Los Angeles* v. *Pomeroy*, *ubi supra*.) It is asserted, however, that there is a trust existing in favor of the Indians and arising by operation of law, because it is claimed Mexico in disposing of her domain, reserved Indian rights, but, as we have shown, no reservation of this kind was made under the treaty, and even if such a reservation was made no trust of any kind would arise as to Warner. It would be a trust imposed upon the national faith and to be executed under the laws of the government, and, as we have shown, in the execution of these laws no reservation of any kind was made. Under the laws of Mexico, as the plaintiffs in error claim, vacant lands alone could be granted.

Even if the Warner Ranch at the time of the Mexican cession was occupied not only by In-

dians, but by many other *bona fide* settlers; yet if the Mexican government and subsequently Federal officials decided that the land was vacant, and therefore was not so occupied, nevertheless, no one can now be allowed to make proof in contravention of the patent. The making of the grant by Mexico, its ratification by the Board of Land Commissioners and the District Court, the survey and the subsequent patent by the United States finally determine that there was no adverse occupancy, and the assumption of such occupancy is inconsistent with the validity of the grant; no trust relation arises merely because there were Indians in possession.

While the Indian may be considered a very valuable member of the community, he is not now, nor has he ever been treated as superior to the governing class. We summarily eject Mexicans and Americans who claim in defiance of a patent, although they may really have been prior occupants.

"Their interest was, at best, only such an equity as arises in favor of parties who had long been in the occupation of public land, with the silent acquiescence of the government, from the possible improvement they may have made upon it. To such parties the government may well extend a preference in the purchase or donation of the lands when it concluded to dispose of them. But mere possession of any portion of the public domain, under an instrument which did not purport to transfer the property, did not create, under the Spanish law, a title in the pos-

sessor which would enable him to hold the property against the crown; nor did such possession, however long continued, create any title against the Mexican government." *Nieto* v. *Carpenter*, 21 Cal., 455, 489.

Harrison v. *Ulrichs, ubi supra.*

No one, however, thinks of asserting a trust as to Mexicans or Americans. The pretention that whenever property is acquired in violation of law a trust arises in favor of the man who ought to be the possessor is, to say the least, novel. And this is more peculiarly true of the Indians, as to whose lands Congress has the exclusive right of pre-emption. And so it was held by the Supreme Court of California, in a case where a patent had been issued to public lands which had been occupied by Indians long before the Treaty of Guadalupe Hidalgo, that the execution of the trust imposed by the treaty was a political power, carried out through the commission, and as the Indian rights were not presented the patent was conclusive evidence of title. This case is a conclusive adjudication that the plaintiffs in error are not third persons within the meaning of the act.

Thompson v. *Doaksum*, 68 Cal., 593.

There is nothing in the pleadings or in the evidence to warrant the annullment of the grant under which we claim. It is hardly necessary to cite cases upon this branch of the subject.

U. S. v. *Throckmorton*, 98 U. S., 61;

U. S. v. *San Jacinto Tin Co.*, 125 Id., 273;
Los Angeles F. & M. Co. v. *Hoff*, 48 Fed. Rep., 340;
Houston v. *San Francisco*, 47 Fed. Rep., 337.

It is true that one purpose of the act of 1851 was to separate and distinguish the lands which the United States owned as property, and which were properly subject to sale as public lands, and from those which belonged either equitably or legally to private parties under titles derived from Spain or Mexico.

There is no dispute as to this, but according to the contention of defendants a Mexican grant which was not presented at all may be valid if confirmation was made to another upon a conflicting grant. The diligence of plaintiff, it would seem, excuses the laches of the defendants.

In *Adam* v. *Norris*, 103 U. S., 593, where the parties each claimed under a patent, Justice Miller said that such an instrument was in the nature of a quit claim; but this view is modified by *Botiller* v. *Dominguez*, and its inaccuracy is pointed out by Justice Field in the quotation already made from the Knight case (142 U. S. 203). We are unable to discover anything in *Townsend* v. *Greely*, 5 Wall., 326, which justifies the argument that upon the issuance of the patent to Warner a trust attached in favor of the Indians. In the Townsend case, defendant claimed under a title derived from a municipal ordinance of the

City of San Francisco, and that municipality asserted title as the successor of a Mexican pueblo. This claim had been approved by the Board of Land Commissioners, and the Court correctly held that the claim was subject to a trust before the presentation to the board, and that the trust was not discharged by the confirmation and the subsequent patent. The pueblo could not take under any circumstances except in trust for its inhabitants; moreover, Justice Field took occasion to note that the decree declared, "That the confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town or city of San Francisco or other competent authority, and as to any residue in trust for the use and benefit of the inhabitants of the property."

In the case at bar the decree contained no reservation; and what is more, there was no disability on the part of Warner to take title in fee. There was no grant in trust to him, and as far as the laws of Mexico were concerned, he was entirely competent to become a grantee in fee simple absolute. Indeed, not only the patent, but also the grant upon which plaintiffs rely, itself gave him the right to the *exclusive* occupancy (Tr. fol., 45), and the finding of the prefect was that the land was vacant (Tr., fol. 41).

Another case relied on by plaintiffs in error upon this point is *Meader* v. *Norton*, 11 Wall.,

442. This decision was rendered in 1871, and when read in connection with *More* v. *Steinbach*, and *Botiller* v. *Dominguez*, tends to support respondent's position. The parties who prevailed in that litigation did not make any such contest as do the Indians here, but they claimed under the only grant before the Court and which matured into a patent, but asserted that the benefits of that patent should come to them. They did not dispute the potentiality of the patent, but sought by proper equitable averments to obtain the title which was held by another; and the grounds upon which the interposition of the Chancellor were invoked were clearly averred. We quote from the decision:

"Argument is not necessary to show that a patent in a suit at law is conclusive evidence of title against the United States and all others claiming under the United States by junior title. Until the patent issues the fee is in the government, but when it issues the legal title passes to the patentee. Persons claiming to hold the land against the patent cannot have relief in a suit at law, but courts of equity have full jurisdiction to relieve against fraud or mistake, and that power plainly extends to cases where one man has procured the patent which belonged to another at the time the patent was issued."

Bagnell v. *Broderick*, 13 Peters, 436;

Patterson v. *Wrenn*, 11 Wheat. 380.

"Where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee

of the true owner and compel him to convey the legal title."

Stark v. *Starr*, 6 Wall., 419.

Commenting on the cases of *Stark* v. *Starr* and *Meader* v. *Norton*, this Court says:

"The substance of these authorities is, that wherever a person obtains a legal title to land by any artifice or concealment, or by making use of facilities intended for the benefit of another, a court of equity will impress upon the land so held by him a trust in favor of the party who is justly entitled to them, and will order the trust executed by decreeing their conveyance to the party in whose favor the trust was created."

Felix v. *Patrick*, 145 U. S., 317, 328.

Bernier v. *Bernier*, 147 U. S., 242.

And, commenting upon the former case, the California Court, says:

"To entitle the alleged owner, however, to such equitable relief, he must show that he occupies such a status as entitles him to control the legal title; that the officers who awarded the land to another, to whom the title was issued pursuant to the judgment, were imposed upon and deceived by the fraudulent practices of him in whose favor the judgment was given; and that they were thereby induced to give judgment in his favor. These things must be distinctly alleged and clearly proven."

Plummer v. *Brown*, 70 Cal., 546.

In other words, in order that the plaintiffs in error can come in under our patent, they must be entitled to control the legal title; there must be artifice or concealment, and they must seek by

appropriate allegations and proofs the conveyance of the title to themselves.

Counsel rely quite confidently upon *Adams* v. *Norris*, *ubi supra*; also *Lease* v. *Clark*, 20 Cal., 425, and *Teschemacher* v. *Thompson*, 18 Cal., 11. These cases merely hold that third parties are those whose title accrued before the duty of this government and its rights under the treaty attached. But such persons in order to maintain their claim were bound to comply with the law regarding the presentation thereof. If it was important to compel the presentation of any claim, no reason can be assigned for making an exception as to Indians. The object was not alone to segregate patented lands from the public domain, but also to "settle" all claims to Mexican title. If A and B hold conflicting titles, and A presents his claim and procures its confirmation, B can not better his condition by the diligence of A, and entirely neglect for all time to prove up. No privity or trust relation existing between the parties, neither could expect to derive any benefit from the enterprise of the other. The earlier decisions read in connection of those of a later day make the solution of this subject free from difficulty. Nor is *U. S.* v. *Morillo*, 1 Wall., 706, in conflict with this view. It was there represented that the lower court had decided in favor of the validity of both patents, and the Supreme Court, assuming this to be the case, pointed out

that there was nothing to show which decree was first made or which claim was first presented, and that therefore great injustice would be done in reversing the judgment, and leaving another claim for the same land to stand affirmed in favor of another person. When this decision was rendered the Court's attention had not been called to the necessity of presenting all claims; nor had the doctrine of *Botiller* v. *Dominguez* become settled or even generally understood.

Doolan v. *Carr*, 125 U. S., 618, is one of the cases upon which counsel relies, but the decision is of no materiality as to the point involved here. It is true that it is decided that a patent is void if issued by officers acting without authority, and the Court well says that the distinction is manifest, although the circumstances that enter into it are not always easily defined. The case presented no such issue as that here involved. Moreover, *Doolan* v. *Carr*, and other similar cases, have been so often misunderstood that Justice Field has taken occasion to more accurately define their significance. (*Knight* v. *U. L. Association*, 142 U. S., 214. See also *Borden* v. *N. P. R. R. Co.*, 154 U. S., 288).

THE TRUE CONSTRUCTION OF THE SIXTEENTH SECTION OF THE ACT OF 1851 REQUIRING THE COMMISSIONERS TO REPORT THE TENURE BY WHICH MISSION LANDS ARE HELD.

Plaintiffs in error assume that Congress did

not intend that the rights of the Indians should be cut off by failure on their part to present their claims. The reference to section sixteen, and the argument in support of appellant's theory is strongly affirmatory of the contrary conclusion. If the Indians are third parties, and if their rights are guarded by section fifteen, can any reason be assigned for the action of Congress in defining the duties of the Commissioners with reference to Mission lands? Obviously the effect of section sixteen must be that Mission lands and Indians, such as the defendants herein, are not protected by section fifteen, and are not "third parties." This being the case, the act of 1851 made it the duty of the Commission to report the status of the Mission Indians to Congress so that that body might be able to provide for their future government and to treat them equitably and in accordance with the general policy of the United States. If the Indians are to be regarded as "third persons," and if their rights were to be conserved under the fifteenth section, *supra*, the sixteenth would be unnecessary. Reading the Treaty of Guadalupe Hidalgo and the Queretaro Protocol the meaning of the Act of 1851 becomes plain. *Mexicans* who held grants within California were provided for. Indians were required to depend upon the generosity of the United States, and the Federal government made it the duty of the Land Com-

mission to give the facts to Congress so that appropriate legislation might be enacted. Undoubtedly the facts were all communicated to the legislative department, and the California Indians were considered in view of the whole situation. When judgment is entered here in favor of the plaintiff, the defendants, if they are entitled to the protection of the government in any respect, will receive that protection; but they have no right to invoke a treaty which does not mention them.

THE STATUS OF THE PLAINTIFFS IN ERROR AS INDIANS DOES NOT RELIEVE THEM FROM THE BINDING EFFECT OF THESE PROCEEDINGS.

The position taken by Mr. Justice McFarland in his dissenting opinion in the California Court seems to us untenable. We have already shown that the legal title to lands such as these did not pass subject to the rights of occupation of the Indians; that such was not the law nor the custom under the Mexican and Spanish rule in California, and we state to this Court with the utmost confidence that there is nothing either in the law or in custom in making California grants to justify such a claim.

In the great mass of authorities cited by Bancroft there is but one instance in which the Spanish or Mexican authorities suggested that

the Indians be left in their rancherias, and that the effort to Christianize and civilize them be made there; and in that instance the contention was abandoned in deference to the arguments of the missionaries. (Bancroft, Vol. VIX, p. 6.) The entire missionary system was destructive of the aboriginal life in rancherias. (Vol. XIX, p. 90, 414.) In place there was substituted a mild but yet absolute serfdom under the missionary rule and at the Missions where the Indians could be controlled.

Blackmar in the interesting work already cited has given a clear and comprehensive account of the system (Spanish Institutions in the Southwest, p. 112). After the secularization of the Missions the condition of the Indians was but little changed; a secular was substituted for a priestly master—they were still dependent, without independent rights.

It is true that the Mexican constitution made no distinction of race, and that the Indian was under the law equally a citizen with the white man. But if this horn of the dilemma is taken it does not benefit the plaintiffs in error.

If it is claimed that they were a class whose rights were preserved even against the express language of a grant, then there is no scintilla of evidence in any of the authorities, including the enormous mass which Bancroft has collected, and that which has been before this Court in the nu-

merous Mexican grant cases to justify such a claim; and in view of the fact that Indians were upon nearly every grant in California at the time the grants were made, and no such contention was ever made excepting in the case of *Byrne* v. *Alas*, where an express reservation in their favor was made in the grant, the contention is without merit.

On the other hand, if they claim that they were "Mexicans" and their rights preserved by the treaty, then it is too clear to need argument to show that they should have presented their claims as other Mexicans, before the duly constituted tribunal.

It is fruitless to enter into the interesting question of the peculiar status of the Indian within the United States and how it arose. We fear it would bring us into the arena of a much broader and deeper political question than arises here; this Court has held that the powers of local self-government enjoyed by the Indian within the limits of the original thirteen states existed prior to the Constitution and therefore is not controlled by the powers conferred by the Constitution on the national government. (*Talton* v. *Mayes*, 163 U. S., 376.) But the Indians in this case had no such powers of local self-government at the time of annexation. There is nothing in their status before annexation to give them any rights or to relieve them from any duty im-

posed upon other persons within the territory annexed, nor is there anything in their present status, for they are not Indians living upon a reservation.

On the other hand if they are pueblo Indians they held whatever title they ever held in fee by grant made by the government of Spain, "recognized by the Mexican government and protected by it in the treaty of Guadalupe Hidalgo" (*U. S.* v. *Joseph*, 94 U. S., 614), which therefore must be submitted to the commission.

Moreover, Indians are chargeable with *laches* if they fail to protect their interests in a suit at law (*Felix* v. *Patrick*, 145 U. S., 317).

Plaintiffs in error in their petition for rehearing in the California Court cited *Choteau* v. *Molony*, 16 How., 203, and *Cherokee Nation* v. *State of Georgia*, 5 Pet., 1, in support of *Byrne* v. *Alas*. The former of these cases, which has never been subsequently cited save by a District Judge *arguendo* (*Muse* v. *Arlington Hotel Co.*, 68 Fed., 642), merely holds that the terms of the grant show that a mining right and not the fee and possession of the soil was intended to be granted. The Court's discussion as to the power of a Spanish Governor to grant subject to the Indians' right of occupation is not necessary to the case. In the case at bar the grant shows that the exclusive right of possession was granted, and the finding of the prefect was that

the land was vacant, both of which are inconsistent with the theory that the grant was made subject to the rights of possession in the Indians. In the latter case, where the Cherokee Nation sought to enjoin the State of Georgia from enforcing its laws within the Cherokee territory, Chief Justice Marshall in delivering the opinion of the Court discusses the question whether the Cherokees constitute a foreign state within the sense of the constitution, and holds that they do not. He incidentally refers to the right of the Indians to occupy, but declares "they occupy territory to which we assert a title independent of their will." Georgia in this case held in fee, the Indians were in occupation and the United States had the sole power to deal with the Indians and to terminate that occupation. These cases have no relation to the case at bar; they deal with different conditions and not with a case where the Mexican government held the fee and the power to terminate the occupation by the Indians irrespective of the differences which we have pointed out in the character and treatment of the Indians in California.

The action of the United States government upon this matter is significant. In 1875 the Agua Caliente lands were declared a reservation. This was before the making of the final survey by Minto. When that survey had been made, taking in the land within the reservation, show-

ing upon it no evidence of any Indian rights either in the field notes or the plat, the very next day after its approval and the isssuance of the patent, namely, January 17th, 1880, by executive order the reservation was revoked. Here is an express declaration on the part of the United States government, the guardian of these wards, that no further claim of Indian rights was made since the matter had been finally adjudicated by the issuance of the patent.

In this suit, however, the same guardian having originally deeded the property, declaring that it was vacant and that we had the right to its exclusive possession; having, in a formal trial, in which the guardian took part and was represented by counsel, the facts now before the Court being before the tribunal, submitted to an adjudication that that grant was valid and binding; having caused a survey to be made and a patent to be issued free and clear of all claims; having the next day voluntarily withdrawn the last semblance of a claim to the premises on behalf of its wards, without any pretense of fraud, or allegation to show any contractual or trust relations, now seeks to maintain that on the understanding of all parties these rights were preserved. Such a contention answers itself.

CONCLUSIONS.

1. *The defendants in error hold under a patent containing no reservations, and such patent is conclusive against the plaintiffs in error.*

2. *The patent being conclusive of the right of defendants in error to recover, there is no pleading or testimony competent to modify or affect it.*

3. *The decision of the prefect and the grant of exclusive possession by the Governor are conclusive of the fact that the land was vacant and unoccupied.*

4. *If it be assumed that plaintiffs in error had any valid right or claim under the laws of Mexico, such right or claim should have been presented to the Board of Land Commissioners appointed under the act of 1851.*

5. *The decision of the Land Commissioners and other appropriate officers of the government of the United States, holding that the land in question was at the time it was patented vacant and subject to absolute alienation is conclusive upon the plaintiffs in error and all others.*

6. *If the plaintiffs in error claim under a title derived from the Mexican government, admitting, as they must, that such title has not been presented, they cannot avail themselves of the presentation of Warner's title, unless they can show that Warner was their trustee and received the legal title under such circumstances as to justify a court of equity in declaring that he*

(Warner) held such title for the benefit of the plaintiffs in error. There is neither pleading nor proof to sustain this theory.

7. *Warner did not claim title to the Valle de San Jose, described in his patent, in consequence of any grant made to plaintiffs in error, or either of them; but claimed and held the same in hostility to the pretensions of the plaintiffs in error; therefore no trust relation existed between Warner and the Indians.*

8. *The survey and the approval thereof after public notice containing no reservation or indication of any Indian rights is an adjudication by the political department of the government that no rights are reserved to them.*

9. *The political department of the government having adjudicated the validity of Warner's title and right to possession the ordinary courts of justice have no jurisdiction to pass upon the controversy.*

10. *Under the laws of Spain and Mexico the status of these Indians was such as to disqualify them from interfering with the grant. The United States did not assume, either by its treaty or otherwise, to support or maintain any Indian claim, nor any previous practice or policy. No law of Spain or Mexico granted California land to the Indians and no such grant has ever been affirmed directly or indirectly by the United States; and independently of the failure of the*

plaintiffs in error to present their claim to the Board of Land Commissioners no right accrued to them to the fee in the land or to the possession thereof under any law of Spain or Mexico.

We respectfully submit that the judgment of the Supreme Court of the State of California should be affirmed.

STEPHEN M. WHITE,
CHARLES MONROE,
DAVID L. WITHINGTON,
CASSIUS CARTER,
For Defendants in Error.

APPENDIX.

TREATY OF PEACE, FRIENDSHIP, LIMITS, AND SETTLMENT BETWEEN THE UNITED STATES OF AMERICA AND THE MEXICAN REPUBLIC.

Dated at Guadalupe Hidalgo, 2d February, 1848; ratified by the President U. S., 16th March, 1848; exchanged at Queretaro, 30th May, 1848; proclaimed by the President U. S., 4th July, 1848.

ARTICLE I.

(Peace.)

There shall be firm and universal peace between the United States of America and the Mexican Republic, and between their respective countries, territories, cities, towns, and people, without exception of places or persons.

ARTICLE II.

(Suspension of Hostilities.)

ARTICLE III.

(Raising Blockades—Withdrawal of Troops, etc.)

ARTICLE IV.

(Restoration of Castles, Forts, Prisoners, etc.)

ARTICLE V.

(Boundary Line.)

ARTICLE VI.

(Navigation of Gulf of California and Colorado River.)

ARTICLE VII.

(Navigation of Gila River and Rio Bravo del Norte.)

ARTICLE VIII.

(Privileges of Mexicans—Citizenship—Property of Non-Resident Mexicans.)

Mexicans now estal lished in territories previously belonging to Mexico, and which remain for the fu-

ture within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories may either retain the title and rights of Mexican Citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratification of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy, with respect to it, guarantees equally ample as if the same belonged to citizens of the United States.

ARTICLE IX.

Admission of Mexicans to Citizenship in the United States.

The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTICLE X.

(Stricken Out.)

[All grants of land made by the Mexican government, or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid to the same extent that the same grants would be valid if the said territories had remained within the limits of Mexico. But the grantees of land in Texas, put in possession thereof, who by reason of the circumstances of the country since the beginning of the troubles between Texas and the Mexican government, may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfill the said conditions within the periods limited within the same respectively; such periods to be now counted from the date of the exchange of ratifications of this treaty; in default of which the said grants shall not be obligatory upon the state of Texas, in virtue of the stipulations contained in this article. The foregoing stipulation in regard to grantees of land in Texas is extended to all grantees of land in the territories aforesaid elsewhere than in Texas, put in possession under such grants; and in default of the fulfillment of the conditions of any such grant within the new period, which, as above stipulated, begins with the day of the exchange of ratifications of this treaty, the same shall be null and void.]

ARTICLE XI.

(Incursions of Savages into Mexican Territory.)

Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States whensoever this may be necessary;

and that, when they cannot be prevented, they shall be punished by the said government, and satisfaction for the same shall be exacted—all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory against its own citizens.

It shall not be lawful, under any pretext whatever, for any inhabitant of the United States to purchase or acquire any Mexican, or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two republics, nor to purchase or acquire horses, mules, cattle or property of any kind, stolen within Mexican territory by such Indians.

And in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the government of the latter engages and binds itself in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them, and return them to their country, or deliver them to the agent or representative of the Mexican government. The Mexican authorities will, as far as practicable, give to the government of the United States notice of such capture; and its agent shall pay the expenses incurred in the maintainance and transmission of the rescued captives; who, in the meantime, shall be treated with the utmost hospitality by the American authorities at the place where they may be. But if the government of the United States, before receiving such notice from Mexico, should obtain intelligence, through any other channel, of the existence of Mexican captives within its territory, it will proceed forthwith to effect their release and delivery to the Mexican agent as above stipulated.

For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress demanded by their true spirit and intent, the government of the United States will now and hereafter pass, without unnecessary delay, and

always vigilantly enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said government when providing for the removal of the Indians from any portion of the said territories, or for its being settled by the citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

ARTICLE XII.

(Fifteen Million Dollars to be aid to Mexico.)

ARTICLE XIII.

(Assumption, by the United States, of Claims Against Mexico.)

ARTICLE XIV.

(Discharge of Claims of American Citizens Against Mexico.)

ARTICLE XV.

(Satisfaction of Claims.

ARTICLE XVI.

(Fortifications for Security.)

Each of the contracting parties reserves to itself the entire right to fortify whatever point within its territory it may judge proper so to fortify, for its security.

ARTICLE XVII.

(Treaty of Amity, Commerce and Navigation.)

ARTICLE XVIII.

(Supplies for American Troops Previous to Evacuation.)

ARTICLE XIX.

(Rules of Importation into Mexican Ports.)

ARTICLE XX.

(Certain Property to be Admitted to Entry.

ARTICLE XXI.

(Future Disagreement—Arbitration.

ARTICLE XXII.

(War—Private Property—Respect for Churches, etc.—Prisoners of War.)

ARTICLE XXIII.

(Ratification of Treaty.)

PROTOCOL.

In the City of Queretaro, on the twenty-sixth of the month of May, eighteen hundred and forty-eight, at a conference between their excellencies Nathan Clifford and Ambrose H. Sevier, Commissioners of the U. S. of A., with full powers from their government to make to the Mexican Republic suitable explanations in regard to the amendments which the Senate and Government of the said United States have made in the treaty of peace, friendship, limits and definitive settlement between the two Republics signed in Guadalupe Hidalgo, on the second day of February of the present year; and His Excellency Don Luis de la Rosa, Minister of Foreign Affairs of the Republic of Mexico; it was agreed, after adequate conversation, respecting the changes alluded to, to record in the present protocol the following explanations, which their aforesaid excellencies, the Commissioners gave in the name of their government and in fulfillment of the commission conferred upon them near the Mexican Republic:

1st. The American government by suppressing the IXth article of the treaty of Guadalupe Hidalgo and substituting the IIId article of the treaty of Louisiana, did not intend to diminish in any way what was agreed upon by the aforesaid article IXth in favor of the inhabitants of the territories ceded by Mexico. Its understanding is that all of that agreement is contained in the 3d article of the treaty of Louisiana. In consequence, all the privileges and guarantees, civil, political and religious, which have been possessed by the inhabitants of the ceded territories, if the IXth article of the treaty had been retained, will be enjoyed by them, without any difference, under the article which has been substituted.

2d. The American government by suppressing the Xth article of the treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territory are those which were legitimate titles under the Mexican law in California and New Mexico, up to the 13th of May, 1846, and in Texas up to the 2d March, 1836.

3d. The government of the United States, by suppressing the concluding paragraph of Article XIIth of the treaty, did not intend to deprive the Mexican Republic of the free and unrestrained faculty of ceding, conveying or transferring at any time (as it may judge best) the sum of the twelve millions of dollars which the said government of the United States is to deliver in the places designated by the amended article.

And these explanations having been accepted by the Minister of Foreign Affairs of the Mexican Republic, he declared, in the name of his government, that with the understanding conveyed by them the same government would proceed to ratify the treaty of Guadalupe, as modified by the Senate and Government of the U. States. In testimony of which the Minister, have signed and sealed, in quintuplicate, the present protocol.

(Seal.) A. H. SEVIER.

(Seal.) NATHAN CLIFFORD.

(Seal.) LUIS DE LA ROSA.

AN ACT TO ASCERTAIN AND SETTLE THE PRIVATE LAND CLAIMS IN THE STATE OF CALIFORNIA. (1.)

(Approved March 3, 1851.)

That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

Sec. 2. That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

Sec. 3. That such clerks, not to exceed five in number, as may be necessary, shall be appointed by the said commissioners.

Sec. 4. That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interest of the United States in the premises, to continue him in such agency as long as the public interest may, in the judgment of the President require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the

(1.) Continued in force until March, 1855, by the 18 Jan., 1854, and until March, 1856, by the 10 Jan., 1855, ch. 25.)

United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

Sec. 5. That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

Sec. 6. That the said commissioners, when sitting as a board and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and to examine witnesses in any case pending before the commissioners, and that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

Sec. 7. That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpœna commanding the attendance of a witness or witnesses before the said board or any commissioner.

Sec. 8. That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claim; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the

evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

Sec. 9. That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petiton, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which peution, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and if the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall

be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the case shall stand for trial, unless, on cause shown, the same shall be continued by the Court.

Sec. 10. That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by the order of the said Court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said Court shall prescribe; and if the Court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

Sec. 11. That the commissioners herein provided for, and the District and Supreme Court, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

Sec. 12. That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of the proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

Sec. 13. That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been pre-

sented to the said commissioners within two years after the date of this act shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the Surveyor-General of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor-general shall have the same power and authority as are conferred on the registrar of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: Provided, always, That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. And provided, further, That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

Sec. 14. That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town; or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be *prima facia* evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village.

Sec. 15. That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

Sec. 16. That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

Sec. 17. That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; and the clerks herein provided for shall be allowed and paid at the

rate of one thousand five hundred dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

Sec. 18. That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpoena. For furnishing certified copies of any paper or record, he shall receive twenty-five cents for every hundred words, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

AN ACT TO EXPEDITE THE SETTLEMENT OF TITLES TO LAND IN THE STATE OF CALIFORNIA—Approved July 1, 1864.

Be it enacted by the Senate and House of Representatives, of the United States of America in Congress assembled, That whenever the surveyor-general of California shall, in compliance with the thirteenth section of an act entitled, "An Act to ascertain and settle the private land claims in the State of California," approved March third, eighteen hundred and fifty-one, have caused any private land claim to be surveyed and a plat to be made thereof, he shall give notice that the same has been done by a publication once a week, for four consecutive weeks, in two newspapers, one published in the city of San Francisco, and one published near the land surveyed; and shall retain in his office, for public inspection, the survey and plat until ninety days from the date of the first publication in San Francisco shall have expired; and if no objections are made to said survey, he shall approve the same, and transmit a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington, for his examination and approval; but if objections are made to said survey within the said ninety days, by any party claiming to have an interest in the tract

embraced by the survey, or in any part thereof, such objections shall be reduced to writing stating distinctly the interest of the objector, and signed by him or his attorney, and filed with the surveyor-general, together with such affidavits or other proofs as he may produce in support of his objections. At the expiration of said ninety days the surveyor-general shall transmit to the Commissioner of the General Land Office at Washington a copy of the survey and plat, and objections, and proofs filed with him in support of the survey, together with his opinion thereon; and if the survey and plat are approved by the said Commissioner, he shall endorse thereon a certificate of his approval. If disapproved by him, or if, in his opinion, the ends of justice would be subserved thereby, he may require a further report from the surveyor-general of California touching the matters indicated by him, or proofs to be taken thereon, or may direct a new survey and plat to be made. Whenever the objections are disposed of, or the survey and plat are corrected, or a new survey and plat are made in conformity with his directions, he shall indorse upon the survey and plat adopted his certificate of approval. After the survey and plat have been, as hereinbefore provided, approved by the Commissioner of the General Land Office, it shall be the duty of the said Commissioner to cause a patent to issue to the claimant as soon as practicable after such approval.

Sec. 2. *And, be it further enacted* That the provisions of the preceding section shall apply to all surveys and plats by the surveyor-general of California heretofore made, which have not already been approved by one of the District Courts of the United States for California, or by the Commissioner of the General Land Office: *Provided*, That where proceedings for the correction or confirmation of a survey are pending on the passage of this act in one of the said District Courts, it shall be lawful for such District Court to proceed and complete its examination and determination of the matter, and its decree thereon shall be subject to appeal to the Circuit Court of

the United States for the district in like manner, and with like effect, as hereafter provided for appeals in other cases to the Circuit Court; and such appeals may be in like manner disposed of by the said Circuit Court.

Sec. 3. *And, be it further enacted*, That where a plat and survey have already been approved or corrected by one of the District Courts of the United States for California, and an appeal from the decree of approval or correction has already been taken to the Supreme Court of the United States, the said Supreme Court shall have jurisdiction to hear and determine the appeal. But where from such decree of approval or correction no appeal has been taken to the Supreme Court, no appeal to that Court shall be allowed, but an appeal may be taken, within twelve months after this act shall take effect, to the Circuit Court of the United States for California, and said Circuit Court shall proceed to fully determine the matter. The said Circuit Court shall have power to affirm, or reverse, or modify the action of the District Court, or order the case back to the surveyor-general for a new survey. When the case is ordered back for a new survey, the subsequent survey of the surveyor-general shall be under the supervision of the Commissioner of the General Land Office, and not of the District or Circuit Court of the United States.

Sec. 4. *And be it further enacted*, That whenever the district judge of any one of the District Courts of the United States for California is interested in any land, the claim to which, under the said Act of March third, eighteen hundred and fifty-one, is pending before him, on appeal from the Board of Commissioners created by said act, the said District Court shall order the case to be transferred to the Circuit Court of the United States for California, which court shall thereupon take jurisdiction and determine the same. The said District Court may also order a transfer to the said Circuit Court of any other cases arising under said act, pending before them, affecting the title to lands within the corporate limits

of any city or town, and in such cases both the district and circuit judges may sit.

Sec. 5. *And, be it further enacted*, That all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California, on the fifteenth of April, one thousand, eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said State, approved on the eleventh of March, eighteen hundred and fifty-eight, entitled "An Act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the Common Council of said city," there being excepted from this relinquishment and grant all sites or other parcels of land which have been, or now are, occupied by the United States for military, naval, or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States, within one year after the rendition to the General Land Office by the surveyor-general of an approved plat of the exterior limits of San Francisco, as recognized in this section, in connection with the lines of public surveys: *And provided*, That the relinquishment and grant by this Act shall in no manner interfere with or prejudice any bona-fide claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof.

Sec. 6. *And, be it further enacted*, That it shall be the duty of the surveyor-general of California to cause all the private land claims finally confirmed, to be accurately surveyed, and plats thereof to be made whenever requested by the claimants: *Provided*, That each claimant requesting a survey and plat shall first deposit in the District Court of the District within which the land is situated, a sufficient sum of money to pay the expenses of such survey and plat, and of the publication required by the first sec-

tion of this act. Whenever the survey and plat requested shall have been completed and forwarded to the commissioner of the General Land Office, as required by this act, the District Court may direct the application of the money deposited, or so much thereof as may be necessary, to the payment of the expenses of said survey and publication.

Sec. 7. *And, be it further enacted,* That it shall be the duty of the surveyor-general of California, in making surveys of the private land claims finally confirmed to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim. But when such decree only designates only the out-boundaries within which the quantity confirmed is to be taken, the location of such quantity shall be made, as near as practicable, in one tract, and in a compact form, and if the character of the land, or intervening grants, be such as to render the location impracticable in one tract, then each separate location shall be made, as near as practicable in a compact form. And it shall be the duty of the Commissioner of the General Land Office to require a substantial compliance with the directions of this section, before approving any survey and plat forwarded to him.

Sec. 8. *And, be it further enacted,* That the act entitled "An Act to amend an act entitled 'An Act to define and regulate the jurisdiction of the District Courts of the United States in California' in regard to the survey and location of confirmed private land claims," approved June fourteenth, eighteen hundred and sixty, and all provisions of law inconsistent with this act, are hereby repealed.

SIETE PARTIDAS.

(Moreau and Carlton's translation, Vol. I, p. 486.)

PARTIDA THIRD—TITLE XXXI.

Of the services which some things have upon others, and how they are created.

LAW 1.

What a service is, and how many sorts there are.

The sages have properly said that a service

(*servidumbre*) is the right and use which one man has in the buildings and estates of another, to use them for the benefit of his own. There are two kinds of service. The first is, that which one house has on another, and which in latin is called *urbana* The second is that which one estate has on another, and is called in latin *rustica*. There are likewise other services which a man has in the things of another, for his personal advantage, and not for the particular advantage of his estate. As where he has the usufruct of gathering the products of another's estate; or the use of the house in which he dwells, or of the houses of another; or of the work of slaves who are artisans or laborers. We shall speak of each of those in the laws of this title.

LAW 3.

What are denominated rural (rustica) services; and how many kinds there are.

We have said that a rural service was that which one estate has in another: as where a man has a path, road, or way through another's estate, to pass in or out of his own. And we say that when one grants the right of a path (*senda*) through his estate, the grantee may pass through the place where it was designated, either on foot, horseback, or alone, or with other persons, provided they go the one before the other, and not abreast: but he cannot pass there with carriages, nor lead packed horses by hand. And if one grants the right of a carriage way (*carrera*,) the grantee may pass there with carriages, and the other things mentioned above. And if a man grant a road (*via*) through his estate, then we say the grantee may pass there on foot, on horseback, either alone, or in company; or he may convey along there, carts, wood, stone, or any other thing necessary for the benefit of the estate, for which the service was created. And the road ought to be of the width and in the place agree upon between the parties at the time it was granted and if no agreement had been made in this respect, then we say, it ought to be eight feet wide. And if it should not be straight, on ac-

count of windings or angles, it ought to be sixteen feet wide in those places, in order that carriages may turn.

LAW 14.

In how many ways a service may be imposed upon things.

Every service that we have mentioned in the laws of this title which one house, or thing can owe another, may be imposed in the three following ways: The first, where the proprietor of a thing voluntarily imposes upon it, a service in favor of another person, either through affection, or for a price which he receives of him. The second is that which is granted by will: as where the testator says: "I consent that the house of such a one enjoy a service upon my house, which shall never be raised higher than it now is"; or that "he may put the beams of his house upon the walls of mine;" or where he grants any other similar service; as the right of way to enter and pass out of his estate, or to draw water for the purpose of watering the lands of the grantee, or other the like. The third is where one acquires a service upon the estate, or house of another, by prescription, as we shall hereafter show.

LAW 20.

Of services called usufruct, or simply use.

We have fully treated in the preceding laws, of the services which one house, or building, or estate, may owe another. We shall now speak of the third sort of services mentioned in the second law of this title: That is to say, the service which a man enjoys in the house or estate of another, for his personal advantage and not for the particular advantage of his estate. And we say, there are three ways in which one may have a personal service upon the things of another. The first is where one man grants to another, for the whole of his life, or for a certain time, the usufruct of his estate, house, slaves, or cattle, or other things which afford a revenue or fruits. This usufruct may be granted either by contract or will. But the grantee ought to gather the fruits in good faith, first giving

security that the thing of which he has the usufruct, shall not be lost or deteriorated by his fault, or by gathering therefrom, more than it is proper he should take; and that in case he should die, or the time of his usufruct expire, in any other manner, the thing shall be restored to the grantor, or to the person to whom he might order it to be restored, or to his heirs, if he be dead. And the usufructary will acquire a right to all the fruits and revenues of the thing upon which the usufruct is granted, and may turn them to his own profit, or sell them, if he choose; but he cannot sell, or pledge the thing itself. The second is where a man grants the use only of his house, or estate, or other things; in that case, the grantee can not enjoy the thing of which the use is granted, so fully as the usufructary can do. For he who has the use only of a thing cannot gather more of its fruits than are necessary for his support. As where the use of a garden is granted to him, he may take of its fruits or plants, so much as is necessary for his consumption, and that of his family; but he cannot take any, to give to others, or to sell. And so we say it would be, where any one had granted to another, the use of his meadow, vineyard, or other thing. And we moreover say that a man cannot sell or pledge the thing of which he has the use; and that he ought to give good security that he will use the thing, in good faith, as a prudent man, and that it shall not be damaged, or deteriorated, or lost by his fault.

LAW 22.

What the usufructuary ought to do for the thing, the usufruct of which is granted to him; and that he ought to preserve, improve, repair and cultivate it.

It is but right and just, that the usufructary of a house, or an estate, or cattle, since he enjoys the profits thereof, should appropriate all he could, to improve, preserve, and faithfully keep the thing itself; so that if it be a house, he should repair and preserve it, that it might not fall or be deteriorated by his fault; or if it be an estate, vineyard, or garden, he ought to cultivate and improve it; and if he took any

trees therefrom, he ought to plant others in their place; or if the usufruct be of cattle and some of them die, he ought to replace them by their increase, and rear others in their place. And if the thing itself be subject to the payment of tythes, or other tribute, or impost; they ought to be paid by the usufructary out of the fruits it yielded, so that the thing remain to the owner entire and unencumbered. But a person who enjoys the use of a thing, is not bound to do what is above mentioned, for the benefit of the thing to the use; unless the thing is so inconsiderable that the whole of its fruits were consumed in the enjoyment of the use; for then he will be obliged to improve, preserve and pay for it, in the manner above prescribed.

LAW 24.

In how many ways the usufruct which one man has of the things of another, may be extinguished.

It is in the course of nature that every thing which man promise by word, or execute by deed, shou'd cease to have effect, however firmly it may have been done. Since therefore we have shown in the preceding laws, the manner in which a usufruct, as well as a simple use, may be established; we will now speak of the manner in which they may be extinguished, or destroyed. And we say that if the grantee of a usufruct, or simple use, die, or be perpetually banished to some island; or if he had been enfranchised, and afterwards fell again into slavery, for some crime he had committed; or if being free, he had himself consented to be sold, as a slave, the usufruct or use which he enjoyed in any thing, would thereby be lost, and the thing itself would be restored to the original proprietor, and so it would be where neither the grantee, nor any person in his name, make use of the usufruct, or use during ten years, while he was in the country, or twenty years while he was out of it: he would then lose both by prescription, and the thing would be again restored to the original proprietor: we likewise say that if the grantee sell to another, the right he had to the thing, both the use and usufruct would be thereby extinguished, and the

thing will return to the original proprietor, so that neither the grantee nor his vendee can afterwards enjoy them. For though the grantee may lease to another, his right of usufruct of a thing; nevertheless he cannot alienate that right. We likewise say that when he who has the right of usufruct in a thing, acquires the property in the thing itself; the usufruct is thereby extinguished, as the property and the usufruct of the thing, are united in the same person.

TRANSLATION OF THE DECREE OF THE MEXICAN CONGRESS OF AUGUST 18TH, 1824, RESPECTING COLONIZATION.

(The translation is taken from White's New Recopilacion, Vol. I, p. 160.)

The Supreme Executive Power, provisionally appointed by the General Sovereign Constituent Congress, to all who shall see and understand these presents: Know ye, that the said Congress has decreed as follows:

Article 1. The Mexican nation offers to foreigners, who come to establish themselves within its territory, security for their persons and property; provided they subject themselves to the laws of the country.

Art. 2. This law comprehends those lands of the nation, not the property of individuals, corporations or towns, which can be colonized.

Art. 3. For this purpose, the Legislatures of all the states will, as soon as possible, form colonization laws, or regulations, for their respective states, conforming themselves, in all things, to the constitutional act, general constitution, and the regulations established in this law.

Art. 4. There cannot be colonized any land comprehended within twenty leagues of the limits of any foreign nation, nor within ten leagues of the coasts, without the previous approbation of the General Supreme Executive Power.

Art. 5. If, for the defense and security of the nation, the Federal Government should deem it necessary to use any portion of these lands, for the construction of warehouses, arsenals, or other public edifices, they can do so, with the approbation of the General Congress, or, in its recess, of the Council of Government.

Art. 6. Until after four years from the publication of this law, there shall not be imposed any tax whatever on the entrance of foreigners who come to establish themselves for the first time in the nation.

Art. 7. Until after the year 1840, the General Congress, shall not prohibit the entrance of any foreigner, as a colonist, unless imperious circumstances should require it, with respect to the individuals of a particular nation.

Art. 8. The government without prejudicing the objects of this law, shall take such precautionary measures, as it may deem expedient, for the security of the Confederation, as respects the foreigners who come to colonize.

Art. 9. A preference shall be given, in the distribution of lands, to Mexican citizens, and no other distinction shall be made in regard to them, except that which is founded on individual merit, or services rendered the country, or, under equal circumstances, a residence in the place where the lands to be distributed are situated.

Art. 10. The military who, in virtue of the offer made on the 27th March, 1821, have a right to lands, shall be attended to by the States, in conformity with the diplomas which are issued to that effect, by the Supreme Executive Power.

Art. 11. If, in virtue of the decree alluded to in the last Article, and taking into view the probabilities of life, the Supreme Executive Power should deem it expedient to alienate any portion of land, in favor of any officer, whether civil or military, of the Federation, it can do so from the vacant lands of the Territories.

Art. 12. It shall not be permitted to unite, in the same hands with the right of property, more than one

league square of land, suitable for irrigation, four square leagues in superficies, or arable land, without the facilities of irrigation, and six square leagues in superfices, of grazing land.

Art. 13. The new colonists shall not transfer their property in mortmain (*Manus muertos.*)

Art. 14. This law guarantees the contracts which the empressarios make with the families which they bring, at their own expense, provided they are not contrary to the laws.

Art. 15. No person who by virtue of this law acquires a title to lands shall hold them if he is domiciled out of the limits of the Republic.

Art. 16. The Government, in conformity with the provisions established in this law, will proceed to colonize the territories of the Republic.

Monterey, 18th August, 1824.

CAYETANO IBARRA, President.
PEDRO DE AHUMADA,
Member and Secretary.
MANUEL DE VILLAY COCIO,
Member and Secretary.

Therefore, we command it to be printed, circulated and obeyed.

NICHOLAS BRAVO,
VICENTE GUERRERO,
MIGUEL DOMINGUEZ,
Members of the Supreme Executive Power.

TRANSLATION OF THE GENERAL RULES AND REGULATIONS FOR THE COLONIZATION OF TERRITORIES OF THE REPUBLIC OF MEXICO, NOVEMBER 21, 1828.

(The translation is taken from Rockwell's Spanish and Mexican law in relation to Mines and Titles to Real Estate, Vol. I, p. 453.)

It being stipulated, in the sixteenth Article of the General Law of Colonization, of the 18th of August, 1824, that the Government, in conformity with the principles established in said law, shall proceed to the

colonization of the territories of the Republic; and it being very desirable, in order to give to said Article the most punctual and exact fulfillment, to dictate some general rules for facilitating its execution, in such cases as may occur, his Excellency has seen fit to determine on the following Articles:

1st. The Governors (*Gefes Politicos*) of the territories in compliance with the law of the General Congress, of the 18th of August, 1824, and under the conditions hereafter specified, to grant vacant lands, in their respective territories, to such contractors, (*empressarios*) families, or private persons, whether Mexicans or foreigners, who may ask for them, for the purpose of cultivating and inhabiting them.

2d. Every person soliciting lands, whether he be an *empressarios* head of a family, or private person, shall address to the Governor of the respective territory a petition, expressing his name, country, profession, the number, description, religion, and other circumstances of the families, or persons, with whom he wishes to colonize, describing as distinctly as possible, by means of a map, the land asked for.

3d. The Governor shall proceed, immediately, to obtain the necessary information whether the petition embraces the requisite conditions required by said law of the 18th of August, both as regards the land and the candidate, in order that the petitioner may at once be attended to; or, if it be preferred, the respective municipal authority may be consulted, whether there be any objection to making the grant or not.

4th. This being done, the Governor will accede, or not, to such petition, in exact conformity to the laws on the subject, and especially to the before mentioned one of the 18th of August, 1824.

5th. The grants made to families, or private persons, shall not be held to be definitively valid without the previous consent of the Territorial Deputation, to which end the respective documents (*expedientes*) shall be forwarded to it.

6th. When the Governor shall not obtain the approbation of the Territorial Deputation, he shall

report to the Supreme Government forwarding the necessary documents, for its decision.

7th. The grants made to *empressarios*, for them to colonize with many families, shall not be held to be definitively valid until the approval of the Supreme Government be obtained; to which the necessary documents must be forwarded, along with the report of the Territorial Deputation.

8th. The definitive grant asked for being made a document, signed by the Governor, shall be given, to serve as a title, to the party interested, wherein it must be stated that said grant is made in exact conformity with the provisions of the laws, in virtue whereof possession shall be given.

9th. The necessary record shall be kept, in a book destined for the purpose, of all the petitions presented and grants made, with the maps of the lands granted, and the circumstantial report shall be forwarded, quarterly, to the Supreme Government.

10th. No *capitulization* shall be admitted for a new town, except the *capitulizator* bind himself, to present, as colonists, twelve families, at least.

11th. The Governor shall designate to the new colonists a proportionate time, within which he shall be bound to cultivate, or occupy the land on the terms, and with the number of persons, or families, which he may have *capitulized* for, it being understood that if he does not comply, the grant of the land shall remain void; nevertheless, the Governor may revaliditate it, in proportion to the part which the party may have fulfilled.

12. Every new colonist, after having cultivated or occupied the land, agreeable to his *capitulization*, will take care to prove the same before the municipal authority, in order that, the necessary record being made, he may consolidate and secure his right of ownership, so that he may dispose freely thereof.

13th. The reunion of many families into one town shall follow, in its formation, interior government, and policy, the rules established by the existing laws for the other towns of the Republic special care being

taken that the new ones are built with all possible regularity.

14th. The *minimum* of irrigable land to be given to one person for colonization shall be 200 varas square, the *minsmum* of land called *de temporal* shall be 800 varas square, and the *minimum* for breeding cattle (*de obsevadeso*) shall be 1,200 varas square.

15. The land given for a house lot shall be 100 varas square.

16th. The spaces which may remain between the colonized lands may be distributed among the adjoining proprietors, who shall have cultivated theirs with the most application, and have not received the whole extent of land allowed by the law, or to the children of said proprietors, who may ask for them, to combine the possession of their families; but on this subject particular attention must be paid to the morality and industry of the parties.

17th. In those territories where there are missions the lands occupied by them cannot be colonized at present, nor until it be determined whether they are to be considered as the property of the establishments of the neophytes, catechumens, and Mexican colonists.

TRANSLATION OF DECREE OF THE CORTES, 4TH OF JANUARY, 1813.

(Hall Mexican Law page 45.)

The general and extraordinary cortes considering that the reduction of the common lands to private dominion is one of the provisions which the welfare of the pueblos and improvement of agriculture and industry most imperiously claim, and wishing at the same time to give with this class of lands an aid to the public necessities, by a premium to the well-merited defenders of the country and a help to the citizens not proprietors, they decree:

Land reduced to Private Ownership.—1. All the vacant or crown lands and municipal property (*propios and arbitrios*) with wooded lands and

lands not wooded, as well on the peninsula and adjacent islands as in the provinces beyond the seas, except the *exidos* necessary for the pueblos, shall be reduced to private property taking care that in those of *propios* and *arbitrios* their annual incomes be supplied by the most opportune means, which by the proposal of the respective provincial deputations the cortes, shall approve.

Titles to be in fee.—In whatever manner the lands shall be distributed, it shall be in fee and with the right of inclosure, in order that the owners may inclose them (without prejudice to the sheep walks (*canadas*), cross-ways, watering-places, and services), and enjoy them freely and exclusively, and destine them to the use or cultivation which may best suit them; but they can not ever entail them, or pass them at any time into mortmain.

(Then follow provisions for the distribution of the land containing no reference to the Indians.

DECREE OF THE 13TH OF SEPTEMBER, 1813.
"*Colleccion de Decretos*," p. 106.

"In which it is commanded that the settlements of Indians reduced to Christianity by the conventual priesthood of Ultramar be delivered to and remain at the disposition of the ordinary clergy.

The general and extraordinary Cortes, in consequence of the representations of Don Jose de Olagurra in the name of the Rev. Bishop-elect of Guyana, Don Jose Ventura Cabello, concerning the evils, which as well in morals as in politics, afflict that province, in that the settlements of Indians entrusted to missions, in which are employed *capidien* and *herefoot* priests, have not been *delenient* to the ordinary priesthood even, when, thirty, forty, fifty, and more years gentilism to our Catholic religion; have come to decree and do decree:

1. All the recent reductions and religious *intendencus* doctrines of the provinces of Ultramar which may be in charge of missionary clergy, which have been reduced ten years, must be immediately delivered to the respective ordinary clergy, without any

excuse or pretext, in conformity to the laws and cedulas in that behoof.

VI. The missionary clergy must immediately, cease to exercise the government or administration of the *haciendas* (estates) of those Indians, it remaining to the care and election of the Indians to dispose by means of their *Ayuntamientos*, and with the intervention of the superior political chief there must be named from among them those who shall be to his satisfaction, and who may have most intelligence to administer them, *distributing the lands* and reducing them to particular ownership in accordance with the Decree of 4 of January, 1813, upon the reduction of the Balchos and other lands to individual ownership."